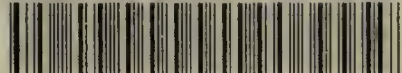


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DOCUMENTS RELATING TO THE WAR POWER
OF CONGRESS, THE PRESIDENT'S AU-
THORITY AS COMMANDER-IN-
CHIEF AND THE WAR
IN INDOCHINA

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE



JULY 1970

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(II)

FOREWORD

On May 11, 1970, the Committee on Foreign Relations adopted the following Committee resolution proposed by Senator Jacob Javits:

“Resolved, That the Committee initiate an inquiry into the division of constitutional authority between the Congress and the President respecting military operations amounting to an exercise of the power of the United States to make war.”

As background for further consideration of this resolution, the following documents have been compiled to facilitate the discussion of matters relating to the war power. In light of the serious constitutional questions raised by the Cambodian incursion and the continued presence of American armed forces in Vietnam, it has seemed desirable to make available in a convenient form some of the recent scholarship on the question of the war power and the division of authority relating to it between the President and Congress.

J. W. FULBRIGHT,
Chairman, Committee on Foreign Relations.

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[S. Res. 85, 91st Cong., first sess.]

THE NATIONAL COMMITMENTS RESOLUTION

Whereas accurate definition of the term "national commitment" in recent years has become obscured: Now, therefore, be it

Resolved, That (1) a national commitment for the purpose of this resolution means the use of the Armed Forces of the United States on foreign territory, or a promise to assist a foreign country, government, or people by the use of the Armed Forces or financial resources of the United States, either immediately or upon the happening of certain events, and (2) it is the sense of the Senate that a national commitment by the United States results only from affirmative action taken by the executive and legislative branches of the United States Government by means of a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment.

(VI)

STATEMENT OF HON. NICHOLAS deB. KATZENBACH, UNDER SECRETARY OF STATE, IN OPPOSITION TO THE NATIONAL COMMITMENTS RESOLUTION*

Mr. Chairman and members of the committee, despite its brevity, the resolution before this committee grapples simultaneously with two of the most important, most enduring, and most complex issues of state in American history.

One of these issues is the allocation of governmental powers, as shaped by our Constitution and by nearly 200 years of experience.

The second issue is the changing role of this Nation in the affairs of a changing world.

It is possible to comment intelligently on the proposed resolution in only a current context. I would like, therefore, to begin my statement of the Administration's views with a few thoughts on the nature and history of both of these issues.

THE CONSTITUTION AND CONSTITUTIONAL PRACTICE

The framers of the Constitution recognized the impossibility of compressing the idea of the separation of powers into a simple formula. They did not attempt to engrave clear lines of demarcation.

With respect to diplomacy, they recognized the complexity of foreign affairs even in the far calmer climate of our Nation's childhood—a time when we took as our watchword Washington's declaration that, "It is our true policy to steer clear of permanent alliances, with any portion of the foreign world."

Hence the Constitution contains relatively few details about how foreign policy decisions shall be made and foreign relations conducted. It recognized that the voice of the United States in foreign affairs was, of necessity, the voice of the President. Consistent with that basic necessity, it also provided for the participation of Congress in a number of ways, direct and indirect.

John Jay observed in *The Federalist* that the Presidency possesses great inherent strengths in the direction of foreign affairs: The unity of the office, its capacity for secrecy and speed, and its superior sources of information.

But, as Professor Corwin has said:

(D)espite all this, actual practice under the Constitution has shown that while the President is usually in a position to propose, the Senate and Congress are often in a technical position at least to dispose. The verdict of history, in short, is that the power to determine the substantive content of American foreign policy is a divided power, with the lion's share falling usually to the President, though by no means always.

The Constitution left to the judgment and wisdom of the Executive and the Congress the task of working out the details of their relation-

*"U.S. Commitments to Foreign Powers," *Hearings Before the Committee on Foreign Relations*, U.S. Senate, 90th Cong., first sess., on S. Res. 151, Aug. 17, 1967, pp. 71-78.

ships. Disagreements susceptible of decision by the Supreme Court have been rare. As a result, controversies over the line of demarcation in foreign affairs have been settled, in the end, by the instinct of the Nation and its leaders for political responsibility.

This has not been an easy formula to apply, even early in our history. President John Adams' use of troops in the Mediterranean, President Monroe's announcement of his renowned doctrine, President Jefferson's Louisiana Purchase, all were criticized at the time as exceeding the power of the Executive acting without the support of a congressional vote.

Similarly, Presidents have frequently criticized actions by Congress as invasions of their responsibility for the conduct of our foreign affairs.

But if the constitutional formula of flexibility was not an easy one, it has surely proved to be a practical and useful one. It has always seemed to me that the genius of our Constitution rests on the recognition of its drafters that they could not provide precise resolution for all future problems, foreseen and unforeseen. And I think that the conduct of foreign affairs demonstrates the validity of this approach.

Despite occasional differences and debates, history has surely vindicated the wisdom of this flexibility—of this essentially political approach to the conduct of our foreign affairs.

In the world we now live in, answers have not become easier. And yet the constitutional allocation of powers continues to work well today.

OUR CHANGING ROLE IN A CHANGING WORLD

Let me turn to the nature of our foreign policy and the role of the United States in the world today—to the commitments of this Nation in foreign affairs.

The basic objective of our foreign policy is the security of the United States and the preservation of our freedoms. How this objective is achieved obviously depends upon the kind of world in which we live and the extent to which we can bring American power and influence to bear upon it.

For most of our history, we had only spasmodic foreign business. We lived in relative isolation, content to allow the European powers to maintain the balance of power on which, in fact, our national security depended.

In recent years, there has been a revolutionary change in the political structure of the world—and of the relative importance of foreign affairs to the United States. What has been perceived by all—by Presidents, by the Congress, and by the people—is that our independence and our security can no longer be assured by default. They depend in large measure on our capacity to lead in the achievement of a system of assured world peace. Within the broad horizons of such a framework—and only within such horizons—can American democracy and American society be safe.

This framework, I believe, rests on three propositions. The first is that events elsewhere can have critical effects on this country; hence our security is bound up with that of other countries.

The second is that we must heed more than power politics. For if we are true to our domestic ideals and are concerned for our domestic security, we cannot ignore the conditions in which people around

the world must live—conditions which can and do fuel reverberating political explosions.

The third is that we cannot and should not meet these first two needs alone, any more than we could or should seek unilaterally to establish a *pax Americana*. We must develop international instrumentalities to help provide collective security and to help create social progress and eliminate the flammable conditions of misery that embrace so much of the world's population.

The United States has made serious, substantial, and enduring efforts to act on all three of these propositions. I do not think it is susceptible of proof, but I firmly believe that the crises we have avoided as a result of imaginative military and political action are at least as important as the crises we have survived.

COORDINATE ACTION BY THE CONGRESS AND THE PRESIDENT

The progress in our efforts has been substantial—and it has been the result of a national commitment. And this has been possible in large measure because of two factors.

This commitment has not been one of administration or of party, but of bipartisanship. One of the remarkable aspects of American foreign policy in the past 20 years is that it has become bipartisan. Partisan politics have, in fact, stopped at the water's edge.

The second factor is the consistent, coordinate action of the Executive and Legislative branches, each in their proper sphere, to propose and dispose, to create and carry out a national commitment.

As America's role in the world has mushroomed, so have the foreign affairs responsibilities of both branches. Nothing could have made this more clear than the VanDenberg resolution of 1948 which established an enduring base for the conduct of our foreign relations.

There is a long series of other examples:

The resolution to support Greece and Turkey was passed by the Congress. Under that resolution, the Administration provided military and economic aid, with funds appropriated by the Congress. It also sent military advisers to help the Greek Army become a more effective force and to conduct successful operations against Communist guerrillas. Without this action, the vast investment authorized by the Congress might not have paid off.

The Marshall Plan was the result both of congressional and executive action—in specifying self-help conditions, in appointing U.S. missions to advise aid recipients, and in agreeing to European proposals regarding apportionment of our aid.

The NATO treaty was approved by the Senate and within its framework, the Executive branch has joined other nations in creating an integrated military structure in contributing to the cost of jointly owned military facilities, and in other actions needed to translate that treaty into effective deterrence.

Important to President Eisenhower's decision to use the U.S. fleet in the Straits of Taiwan and his decision to send marines to Lebanon in 1958 were congressional resolutions expressing the security interests of the United States in those areas.

President Kennedy's decision to call up reserve and National Guard units at the time of the Berlin crisis accorded not only with our NATO

obligations, but also a series of congressional actions in support of the security of Western Europe.

Beyond specific instances, the underlying framework concerning collective security in the past 20 years has been a series of treaty obligations and legislative provisions—the United Nations Charter, coupled with treaties with 42 countries. On each of these the President sought and secured the advice and consent of the Senate.

CONSTITUTIONAL QUALITY OF COMMITMENTS

Let me emphasize the constitutional quality of these commitments. By their nature, they set only the boundaries within which the United States will act. They cannot and do not spell out the precise action which the United States would take in a variety of contingencies. That is left for further decision by the President and the Congress.

In short, none of these incur automatic response. But they do make clear our pledge to take actions we regard as appropriate in the light of all the circumstances—our view that we are not indifferent to the actions of others which disturb the peace of the world and threaten the security of the United States.

Congress has been a full partner, as well, in the great national effort to accelerate the pace of economic and social progress elsewhere in the world:

We have participated in global and regional organizations like the various agencies of the United Nations, the World Bank, the International Monetary Fund, the Asian Development Bank, the International Development Association, and others.

We have revised our trade policies and we have supported regional economic planning, common markets, and other forms of development.

We have sent our young people abroad in the Peace Corps, our food abroad under the Public Law 480 program, and our technical, financial, and development assistance abroad in the AID program.

In all of these actions, the various committees of Congress and the Congress as a whole have participated fully in a variety of ways. In each, there has been express approval and authorization for executive action.

Frequently, in adopting legislation related to the conduct of foreign affairs, the Congress makes findings and declarations of policy, which express its view on broad policy issues and offer guidance to the executive branch.

On several occasions the Congress has adopted joint or concurrent resolutions declaring U.S. defense and foreign policy in relation to particular troubled areas of the world.

The Congress also has a key role in international agreements. In the case of treaties, the Senate's advice and consent is required. In the case of legislation to implement treaty commitments, or to authorize subsequent executive agreements, both Houses give approval.

FORMAL AND INFORMAL CONSULTATION BETWEEN THE TWO BRANCHES

Finally, there is the central fiscal power. In the exercise of its annual appropriations functions, the Congress reviews and debates the foreign policies of the Administration.

Beyond these formal methods of congressional participation in foreign policy, there is the process of informal consultation between the Executive and the Congress. There are literally thousands of contacts each year between officers of the Executive branch and Members of Congress.

Not only do the Secretary and other high officials of the Department of State consult regularly and frequently with congressional leaders and committees; the President has often conducted such consultations personally and extensively.

THE IMPORTANCE OF COORDINATE ACTION

As I noted at the outset, the drafters of the Constitution recognized that the voice of the United States in foreign affairs was that of the President. Throughout our history the focus has always been upon the Presidency, and it is difficult to imagine how it could be otherwise. Jefferson put it succinctly: "The transaction of business with foreign nations is Executive altogether."

I think it is fair to say, as virtually every commentator has in fact said throughout our history, that under our constitutional system the source of an effective foreign policy is Presidential power. His is the sole authority to communicate formally with foreign nations; to negotiate treaties; to command the armed forces of the United States. His is responsibility born of the need for speed and decisiveness in an emergency. His is the responsibility for controlling and directing all the external aspects of the Nation's power. To him flow all of the vast intelligence and information connected with national security. The President, of necessity, has a preeminent responsibility in this field.

But to say this is not to denigrate the role of Congress. Whatever the powers of the President to act alone on his own authority—and I doubt that any President has ever acted to the full limits of that authority—there can be no question that he acts most effectively when he acts with the support and authority of the Congress.

And so it is that every President seeks in various ways—formal and informal—the support of Congress for the policies which the United States pursues in its foreign relations.

CONSTITUTIONAL POWERS OF PRESIDENT AND CONGRESS

In part, the Constitution compels such support. It gives the President the responsibilities for leadership. It also gives the Congress specific powers which can on the one hand frustrate and distort and on the other hand support and implement.

Obviously, then, there are great advantages to the Nation in the conduct of its foreign policy when circumstances permit the President and the Congress to act together. The commitments of this Nation to the United Nations Charter and to our allies are more than a matter of constitutional process. It is essential that these basic commitments should be clear, both to our friends and to our potential adversaries. Fitfulness of policy and unpredictability of action make for serious international instability, disorder, and danger.

In short, our safety and our success depend in large measure on the confidence of other nations that they can rely on our conduct and our assurances.

It is, therefore, as important that the Congress fill its constitutional role as it is that the President fill his. The Congress is and must be a participant in formulating the broad outlines of our foreign policy, in supporting those fundamental and enduring commitments on which the conduct of day-to-day diplomacy depend.

But to say this is not to say that the Congress can or should seek to substitute itself for the President or even to share in those decisions which are his to make.

As I have said, the Constitution relies not on express delineation to set the powers of the Executive and the Congress in this field, but depends instead on the practical interaction between the two branches. Today, these considerations require that the President fill the pre-eminent role:

He alone has the support of the administrative machinery required to deal with the sheer volume of our foreign affairs problems.

He alone is the focus of diplomatic communications, intelligence sources and other information that are the tools for the conduct of foreign affairs.

He alone can act, when necessary, with the speed and decisiveness required to protect our national security.

CONCLUSION

I see no need to revise the experience of our history, or to seek to alter the boundaries of Presidential or congressional prerogative regarding foreign affairs. The need, as always, is to make the constitutional scheme and the experience of history continue to work.

"For myself," President Johnson has observed, "I believe that this is the way our system was intended to function—not with Presidents and Congresses locked in battle with each other—but locked arm in arm instead, battling for the people that we serve together."

Thank you, Mr. Chairman.

DEPARTMENT OF STATE OPPOSES ENACTMENT OF SENATE RESOLUTION 151

The CHAIRMAN. Thank you, Mr. Secretary. It is not clear to me from your statement and I wonder if you could make it more precise: Does the Department support or oppose the enactment of Senate Resolution 151?

Mr. KATZENBACH. I could not support the resolution, Mr. Chairman, because it seems to me that, if I understand it correctly, perhaps I do not, if I understand it correctly, it seems to me that it tries to do precisely what the Founding Fathers of this country declined to do in writing the Constitution, in that it purports to take a position, through a Senate resolution, on matters that it seems to me have worked out successfully in terms of distribution of functions between the Executive branch and the Congress. And it seems to me that it could be interpreted to seek to join the Congress with the President on those matters which I think the President, in his capacity of conducting foreign relations of the United States has the constitutional authority to do.

So, in short, I see no need for it. I find it confusing, and I doubt that even in our almost 200 years we have achieved the wisdom to resolve these problems which our forefathers, in drafting the Constitution, decided that they would leave to the Congress and the President in their wisdom, in their political experience, in their responsibility, in their judgment and in their joint responsibilities to work out for themselves.

The CHAIRMAN. Then, in short, you oppose its enactment?

Mr. KATZENBACH. That is correct. . . .

FOREIGN RELATIONS COMMITTEE COMMENTS ON THE NATIONAL COMMITMENTS RESOLUTION*

* * * The doctrine of the separation of powers was adopted by the convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.¹

* * * The experience through which the world has passed in our own day has made vivid the realization that the framers of our Constitution were not inexperienced doctrinaires. These longheaded statesmen had no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power. * * * The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.²

Our country has come far toward the concentration in its national executive of unchecked power over foreign relations, particularly over the disposition and use of the Armed Forces. So far has this process advanced that, in the committee's view, it is no longer accurate to characterize our government, in matters of foreign relations, as one of separated powers checked and balanced against each other. For causes to be detailed in the following pages, the executive has acquired virtual supremacy over the making as well as the conduct of the foreign relations of the United States.

The principal cause of the constitutional imbalance has been the circumstance of American involvement and responsibility in a violent and unstable world. Since its entry into World War II the United States has been deeply, and to a great extent involuntarily, involved in a series of crises which have revolutionized and are continuing to revolutionize the world of the 20th century. There is no end in sight to these global commotions; there is no end in sight to deep American involvement in them. Because of the indefinite duration of our country's involvement in world crisis, it is more rather than less necessary to examine the effects of this involvement on the American system of government. Unless it is believed that a government of limited and divided powers is no longer feasible, or no longer desirable, insofar as foreign relations is concerned, it is incumbent upon us to ask how such a government can be accommodated to modern world conditions.

The committee believes that changed conditions, through the principal cause of the present constitutional imbalance, are not its sole cause. It believes that events have been aided and abetted by what Justice Frankfurter called the "generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." Both the executive and the Congress have

*From the Report of the Foreign Relations Committee on S. Res. 85, Apr. 16, 1969, pp. 7-34.

¹ *Myers v. United States*, 1926, 272 U.S. 293, Mr. Justice Brandeis dissenting.

² *Youngstown Co. v. Sawyer*, 1952, 343 U.S. 593-594, Mr. Justice Frankfurter concurring.

been periodically unmindful of constitutional requirements and prescriptions, the executive by its incursions upon congressional prerogative at moments when action seemed more important than the means of its initiation, the Congress by its uncritical and sometimes unconscious acquiescence in these incursions. If blame is to be apportioned, a fair share belongs to the Congress. It is understandable, though not acceptable, that in times of real or seeming emergency the executive will be tempted to take shortcuts around constitutional procedure. It is less understandable that the Congress should acquiesce in these shortcuts, giving away that which is not its to give, notably the war power, which the framers of the Constitution vested not in the executive but, deliberately and almost exclusively, in the Congress.

More important than the allocation of blame, of which there is a fair share for all concerned, is the identification of causes and the prescription of correctives for the existing constitutional imbalance. The committee believes that the basic cause has been the unfamiliarity of world involvement and recurrent crisis to the American people and their government. Prior to 1940 foreign crises were infrequent and therefore put no lasting strain on our institutions.

Since 1940 crisis has been chronic and, coming as something new in our experience, has given rise to a tendency toward anxious expediency in our response to it. The natural expedient—natural because of the real or seeming need for speed—has been executive action. In instances such as the undeclared naval war we fought with Germany prior to the formal declaration of war in December 1941, the Korean war, the intervention in Lebanon, the two crises over Cuba, the Dominican intervention and the Vietnamese war, we have not deliberately overridden our constitutional processes; rather, we have been unmindful of them. Perceiving, and sometimes exaggerating, the need for prompt action, and lacking traditional guidelines for the making of decisions in an emergency, we have tended to think principally of what needed to be done and little, if at all, of the means of doing it.

A close analysis of recent statements on the war power by officials in the executive branch (to which further and more specific reference will be made in section 4 of the committee's comments) shows a lack of concept and clarity. Sometimes it is contended that the President has full authority as Commander in Chief to commit the country to war. Sometimes it is said that the consent of Congress is required but that this can be rendered by indirection—by broadly phrased policy resolutions, by appropriations to finance commitments already made, or, tacitly, by the failure of Congress to take some specified action. The prevailing view in recent years seems to have been that the President has the authority to commit the country to war but that the consent of Congress is desirable and convenient. The inconsistency of these statements and the offhand way in which they are made—in response to questions by Congressional committees and by the press—suggest that they have not been given serious consideration. They are, for the most part, *ad hoc* and *ex post facto*, designed to give a pleasing or persuasive answer to a difficult question and, even more, to justify some action which has already been taken. Lacking consistency and constitutional foundation, these statements reflect the habit of expediency into which we have fallen in our dealings with crisis abroad.

They reflect a *de facto* philosophy of executive supremacy in the making of foreign policy.

Entering our second quarter century as an active world power, we should by now be sufficiently acquainted with crisis and world involvement to be able to restore our decision making to institutional foundations. The effort to do so might, conceivably, reveal that the war power of the Congress, and perhaps the very system of checks and balances, are obsolete, in which event it would be necessary to amend the Constitution—by one of the procedures for doing so set forth in the Constitution. A constitutional amendment giving the President plenary powers in foreign policy would, in the view of the committee, be dangerous to American liberties; it could, however, be justified if our system of separated powers, checked and balanced against each other, were to prove so incapable of meeting foreign emergencies as to undermine national security. What cannot be justified is the alteration of the Constitution by expediency and inadvertency. Precedent and practice, long established, can acquire the force of law, but change is not its own justification: the mere exercise of a power does not legitimize it and, under our system of law, bad precedents can be reversed.

The committee believes that the division of powers spelled out in the Constitution is in fact compatible with our country's role as a world power. The principal purpose of that division, as Justice Brandeis noted, is liberty rather than efficiency, but, unless speed is equated with efficiency and deliberation held to be an obstacle to it, there is no reason why we cannot have under our system of government a foreign policy which is efficient as well as democratically made. Indeed, it can be argued that the division and limitation of powers are indispensable to American foreign policy.

Foreign policy is not an end in itself. We do not have a foreign policy because it is interesting or fun, or because it satisfies some basic human need; we conduct foreign policy for a purpose external to itself, the purpose of securing democratic values in our own country. These values are largely expressed in *processes*—in the *way* in which we pass laws, the *way* in which we administer justice, and the *way* in which government deals with individuals. The means of a democracy *are* its ends; when we set aside democratic procedures in making our foreign policy, we are undermining the purpose of that policy. It is always dangerous to sacrifice means to ostensible ends, but when an instrument such as foreign policy is treated as an end in itself, and when the processes by which it is made—whose preservation is the very objective of foreign policy—are then sacrificed to it, it is the end that is being sacrificed to the means. Such a foreign policy is not only inefficient but positively destructive of the purposes it is meant to serve.

For these reasons the committee believes that the restoration of constitutional balance in the making of foreign commitments is not only compatible with the requirements of efficiency but essential to the purposes of democracy. The committee does not share Mr. Katzenbach's view that the demarcation of authority between President and Congress can and should be left to be settled "by the instinct of the nation and its leaders for political responsibility."³ Nor does the

³ "U.S. Commitments to Foreign Powers," *Hearings Before the Committee on Foreign Relations*, U.S. Senate, 90th Cong., first sess., on S. Res. 151 (Washington: U.S. Government Printing Office, 1967), p. 72.

committee share the more recently expressed view of the Department of State, conveyed by Mr. Macomber, that, because the Constitution contained few provisions regarding foreign relations, "The relationship between the executive and legislative branches in this area has therefore developed in practice through a long series of situations calling for action by the President and by the Congress." The framers of the Constitution gave us more specific and reliable guidelines for drawing the line of demarcation, particularly as to treaty-making and the authority to commit the country to war. The latter, as we shall see, was not divided except in a very limited sense. Excepting only the necessary authority of the President to repel a sudden attack, the war power was vested in the Congress. Only in recent years has it passed to the executive, contributing to the dangerous tendency toward executive supremacy in foreign policy, a tendency which the committee hopes to see arrested and reversed.

1. THE INTENT OF THE FRAMERS

There is no uncertainty or ambiguity about the intent of the framers of the Constitution with respect to the war power. Greatly dismayed by the power of the British Crown to commit Great Britain—and with it the American colonies—to war, fearful of the possible development of monarchical tendencies in their new republic, and fearful as well of the dangers of large standing armies and military defiance of civilian authority, they vested the power to commit the United States to war exclusively in Congress. This power was not, like certain others, divided between the executive and the legislature; it was conferred upon Congress and Congress alone.

It was understood by the framers—and subsequent usage confirmed their understanding—that the President in his capacity as Commander in Chief of the Armed Forces would have the right, indeed the duty, to use the Armed Forces to repel sudden attacks on the United States, even in advance of Congressional authorization to do so. It was further understood that he would direct and lead the Armed Forces and put them to any use specified by Congress but that this did not extend to the initiation of hostilities. As Senator Ervin said in his statement to the committee, "* * * a distinction must be drawn between defensive warfare and offensive warfare."⁴

The Constitutional Convention had at first proposed to give Congress the power to "*make war*" but changed this to "*declare war*." The purpose of the change was not to enlarge Presidential power in any significant degree (it was supported by delegates who subsequently refused to sign the Constitution on the ground that it gave too much power to the President) but to permit him to take action to repel sudden attacks. Madison's notes on the proceedings of the convention report the change of wording as follows:

Mr. Madison and Mr. Gerry *moved* to insert "*declare*," striking out "*make*" war; leaving to the Executive the power to repel sudden attacks.⁵

It should be remembered as well that the Congress was not expected to be in session for more than 1 month a year and that it was thought

⁴ *Ibid.*, p. 194.

⁵ *The Records of the Federal Convention of 1787*, 4 volumes. Max Farrand, editor, New Haven and London: Yale University Press, 1966), vol. 2, p. 318.

that it would be dangerous to leave the country defenseless during the long adjournment. Were the matter being considered now, in our age of long congressional sessions, rapid transportation, and instantaneous communication, one may wonder whether it would be thought necessary to concede the Executive any authority at all in this field. In any case it was authority to repel sudden attacks—that and nothing more—that the framers conceded to the President.

As to the powers of the President as Commander in Chief, Alexander Hamilton, an advocate of strong executive power, wrote in *Federalist* No. 69:

The President is to be commander in chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy, while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature.⁶

Relatively little attention was given by the Constitutional Convention to the comparative roles of President and Congress in making war. The probable reason, a recent scholar suggests, is that the full power to initiate the use of the armed forces was assumed by everyone to rest with Congress; seeing no issue of separation of powers, they gave the matter scant attention.⁷

The evidence is abundant that the framers did not intend the executive to have the power to initiate war. In a letter to Madison in 1789 Thomas Jefferson wrote:

We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.⁸

2. THE WAR POWER FROM 1789 TO 1900

The early Presidents carefully respected Congress' authority to initiate war. President Adams took action to protect American ships from French attacks on the Atlantic only to the extent that Congress authorized him to do so; even in the case of this "limited war" between the United States and revolutionary France the President did not regard himself as free to use the Armed Forces without authorization by Congress.

Early in his term of office President Jefferson sent a naval squadron to the Mediterranean to protect American commerce against piracy, but it was not at first permitted to engage in offensive action against the Barbary pirates. On December 8, 1801, President Jefferson, having judged that offensive action was necessary, sent the following message to Congress:

Tripoli, the least considerable of the Barbary States, had come forward with demands unfounded either in right or in compact, and had permitted itself to denounce war on our failure to comply before a given day. The style of the demand admitted but one answer. I sent a small squadron of frigates into the Mediterranean * * * with orders to protect our commerce against the threatened

⁶ *The Federalist* (Henry Cabot Lodge, editor, New York and London: G. P. Putnam's Sons, 1908), pp. 430-431.

⁷ Robert William Russell, *The United States Congress and the Power To Use Military Force Abroad*, Ph. D. thesis, Fletcher School of Law and Diplomacy, 1967, pp. 58-59.

⁸ *The Papers of Thomas Jefferson*, 17 volumes (Julian P. Boyd, ed., Princeton: Princeton University Press, 1955), vol. 15, p. 397.

attack. * * * Our commerce in the Mediterranean was blockaded and that of the Atlantic in peril. * * *

Then, referring to the capture of one of the Tripolitan ships by the American ship *Enterprise*, Jefferson continued:

* * * Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that in the exercise of this important function confided by the Constitution to the Legislature exclusively their judgment may form itself on a knowledge and consideration of every circumstance of weight.⁹

The Monroe Doctrine is often cited as an instance and precedent for the making of foreign commitments by executive action. In fact a distinction was made at the time between a statement of policy and its implementation, the latter being regarded as falling within the province of Congress. In reply to an inquiry by the Government of Colombia in 1824 as to what action the United States might take in response to possible European intervention against the new Latin American republics, Secretary of State John Quincy Adams replied:

With respect to the question, "in what manner the Government of the United States intends to resist on its part any interference of the Holy Alliance for the purpose of subjugating the new republics or interfering in their political forms" you understand that by the Constitution of the United States, the ultimate decision of this question belongs to the Legislative Department of the Government. * * *¹⁰

In 1846 President Polk sent American forces into the disputed territory between Corpus Christi and the Rio Grande River, precipitating the clash which began the Mexican War. The constitutionality of this act is uncertain but Abraham Lincoln, then a Congressman from Illinois, was certain that it was unconstitutional. He wrote:

* * * Allow the President to invade a neighboring nation, whenever *he* shall deem it necessary to repel an invasion, and you allow him to do so, *whenever he may choose to say* he deems it necessary for such purpose—and you allow him to make war at pleasure. Study to see if you can fix *any limit* to his power in this respect, after you have given him so much as you propose. * * *

The provision of the Constitution giving the warmaking power to Congress, was dictated, as I understand it, by the following reasons. Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This, our Convention undertook to be the most oppressive of all Kingly oppressions; and they resolved to so frame the Constitution that *no one man* should hold the power of bringing this oppression upon us.¹¹

During the 19th century American Armed Forces were used by the President on his own authority for such purposes as suppressing piracy, suppressing the slave trade by American ships, "hot pursuit" of criminals across frontiers, and protecting American lives and property in backward areas or areas where government had broken down. Such limited uses of force without authorization by Congress, not involving the initiation of hostilities against foreign governments, came to

⁹ U.S. Congress, Joint Committee on Printing, *Compilation of Messages and Papers of the Presidents*, 20 volumes (James D. Richardson, editor, New York: Bureau of National Literature, Inc. 1897), vol. 1, p. 314.

¹⁰ John Quincy Adams to Don José María Salazar, Aug. 6, 1824, quoted in *The Record of American Diplomacy* (Ruhl J. Bartlett, editor, third edition, New York: Alfred A. Knopf, 1954), p. 185.

¹¹ Letter to William H. Herndon, Feb. 15, 1848, in *The Collected Works of Abraham Lincoln*, 9 volumes (New Brunswick: Rutgers University Press, 1953), vol. 1, pp. 451–452.

be accepted practice, sanctioned by usage though not explicitly by the Constitution.

Some Presidents, notably Polk, Grant, and McKinley, interpreted their powers as Commander in Chief broadly, while others, such as the early Presidents and Buchanan and Cleveland, were scrupulously deferential to the war power of Congress. Summarizing the war power in the 19th century, Robert William Russell writes:

It is not a simple matter to arrive at conclusions concerning this period in which the constitutional interpretation was far from consistent, where Grant's extreme view is sandwiched between the conservative views of Buchanan and Cleveland. But there was one opinion that enjoyed wide acceptance: the President could constitutionally employ American military force outside the nation as long as he did not use it to commit "acts of war." While the term was never precisely defined, on "act of war" in this context usually meant *the use of military force against a sovereign nation* without that nation's *consent* and without that nation's having declared war upon or used force against the United States. To perform acts of war the President needed the authorization of Congress. Even when a foreign state initiated military acts of war, the President always sought *post hoc* congressional approval for his response.

This dividing line between the proper spheres of legislative and executive authority was sufficiently flexible to permit the President to use military force in the unimportant cases, while preserving the role of Congress in important decisions. The acts of war doctrine was probably a step beyond what the framers intended when they changed the congressional power from "make" war to "declare" war, and was certainly a move in the direction of Presidential power compared to the cautious stance of Washington, Adams, Jefferson, and Madison. The central objective which the Constitution sought—congressional authority to approve the initiation of major conflicts—was undamaged, but a certain fraying of the edges had occurred. This slight deterioration was greatly accelerated during the following 50 years.¹²

3. THE EXPANSION OF EXECUTIVE POWER IN THE 20TH CENTURY, 1900-41

The use of the Armed Forces against sovereign nations without authorization by Congress became common practice in the 20th century. President Theodore Roosevelt used the Navy to prevent Colombian forces from suppressing insurrection in the province of Panama and intervened militarily in Cuba and the Dominican Republic. Presidents Taft and Wilson also sent armed forces to the Caribbean and Central America without Congressional authorization. In Haiti, the Dominican Republic, and Nicaragua these interventions resulted in the establishment of American military governments.

President Wilson seized the Mexican port of Vera Cruz in 1914 as an act of reprisal, in order, he said, to "enforce respect" for the government of the United States. The two Houses of Congress adopted separate resolutions in support of President Wilson's action but the Senate did not complete action on its resolution until after the seizure of Vera Cruz. After the Mexican bandit Pancho Villa raided the town of Columbus, N. Mex., in 1916, President Wilson sent a force under General Pershing into Mexico in "hot pursuit" of the bandits; the expedition turned into a prolonged intervention of nearly 2 years and almost brought about war with Mexico. The Senate adopted a resolu-

¹² Russell, *The United States Congress and the Power To Use Military Force Abroad*, pp. 242-243.

tion supporting the President after General Pershing's force had entered Mexico; this resolution was never reported out of the Foreign Affairs Committee of the House of Representatives.

The military powers which had been acquired by Presidents in the 19th century—for purposes of "hot pursuit" and the protection of American lives and property, and under treaties which conferred rights and obligations on the United States—were not serious infringements on Congress' war power because they had been used for the most part against individuals or bands of pirates or bandits and not against sovereign states. Roosevelt, Taft, and Wilson used these powers to engage in military action against sovereign states, thereby greatly expanding the scope of executive power over the use of the armed forces and setting precedents for the greater expansions of executive power which were to follow. The Congress' of that era did not see fit to resist or oppose these incursions of their constitutional authority; indeed, as we have noted, one or both Houses of Congress gave retroactive approval to President Wilson's unauthorized interventions in Mexico.

In 1941 President Roosevelt, on his own authority, committed Presidential power to make war. Indeed, when it came to full-scale conflict with Germany, President Wilson explicitly acknowledged the war power of the Congress. *Advising* Congress to declare war on Germany in his war message of April 2, 1917, the President said:

I have called the Congress into extraordinary session because there are serious, very serious, choices of policy to be made, and made immediately, which it is neither right nor constitutionally permissible that I should assume the responsibility of making.¹³

President Franklin Roosevelt expanded executive power over the use of the Armed Forces to an unprecedented degree. The exchange of overaged American destroyers for British bases in the Western Hemisphere was accomplished by executive agreement, in violation of the Senate's treaty power, and was also a violation of the international law of neutrality, giving Germany legal cause, had she chosen to take it, to declare war on the United States. The transaction was an *emergency* use of Presidential power, taken in the belief that it might be essential to save Great Britain from invasion.

Roosevelt, Taft, and Wilson asserted no general or "inherent" American forces to the defense of Greenland and Iceland and authorized American naval vessels to escort convoys to Iceland provided that at least one ship in each convoy flew the American or Icelandic flag. When the American destroyer *Greer* was fired on by a German submarine, after having proceeded to its position upon being signaled as to its location by a British plane and then tracking it with sound equipment, whereupon the British plane dropped depth charges against the submarine, President Roosevelt utilized the occasion to announce that thereafter American naval vessels would shoot on sight against German and Italian ships west of the 26th meridian. By the time Germany and Italy declared war on the United States, in the wake of the Japanese attack on Pearl Harbor, the United States had already been committed by its President, acting on his own authority, to an undeclared naval war in the Atlantic. Roosevelt, however,

¹³ *The Public Papers of Woodrow Wilson: War and Peace*, 2 volumes (Ray Stannard Baker and William E. Dodd, editors, New York and London: Harper Bros.), vol. 1, p. 6.

achieved his objective without asserting a general or "inherent" Presidential power to commit the Armed Forces abroad.

4. THE PASSING OF THE WAR POWER FROM CONGRESS TO THE EXECUTIVE AFTER WORLD WAR II

The trend initiated by Theodore Roosevelt, Taft, and Wilson, and accelerated by Franklin Roosevelt, continued at a rapid rate under Presidents Truman, Eisenhower, Kennedy, and Johnson, bringing the country to the point at which the real power to commit the country to war is now in the hands of the President. The trend which began in the early 20th century has been consummated and the intent of the framers of the Constitution as to the war power substantially negated.

By the late 1940's there had developed a kind of ambivalence as to the war power in the minds of officials in the executive branch, Members of Congress and, presumably, the country at large. On the one hand, it was and still is said that Congress alone has the power to declare war; on the other hand it was widely believed, or at least conceded, that the President in his capacity as Commander in Chief had the authority to use the Armed Forces in any way he saw fit. Noting that the President has in fact exercised power over the Armed Forces we have come to assume that he is entitled to do so. The actual possession of a power has given rise to a belief in its constitutional legitimacy.

The fact that Congress has acquiesced in, or at the very least has failed to challenge, the transfer of the war power from itself to the executive, is probably the most important single fact accounting for the speed and virtual completeness of the transfer. Why has Congress agreed to this rearrangement of powers which is without constitutional justification, and at its own expense?

To some degree, it seems to be the result of the unfamiliarity of the United States with its new role as a world power. Lacking guidelines of experience for the accommodation of our constitutional system to the new demands that have been made upon it, Congress has acquiesced in the resort to expedients in foreign policy making which we have already noted. In addition, the fact that so many of the great policy decisions of the postwar era have been made in an atmosphere of real or contrived urgency has put tremendous pressure on Members of Congress to set aside apprehensions as to the exercise of power by the executive lest they cause some fatal delay or omission in the nation's foreign policy.

Another possible factor in congressional passivity is that Congress may have permitted itself to be overawed by the cult of executive expertise. Like the newly rich who go beyond the bounds of good taste in material display, the newly powerful may go beyond the bounds of good judgment in their intellectual display. A veritable army of foreign policy experts has sprung up in government and in the universities in recent years, contributing greatly to our knowledge and skill in foreign relations but also purveying the belief that foreign policy is an occult science which ordinary citizens, including Members of Congress, are simply too stupid to grasp. Many Members of Congress seem to have accepted this viewpoint, forgetting the point made by Profes-

sor Bartlett that “* * * there are no experts in wisdom concerning human affairs or in determining the national interest, and there is nothing in the realm of foreign policy that cannot be understood by the average American citizen.”¹⁴

There may also be a historical memory at work in Congress' acceptance of executive predominance in foreign relations. The Senate, it has long been widely agreed, acted with disastrous irresponsibility in its rejection of the Covenant of the League of Nations in 1919. Since at least 1945, when the Senate ratified the United Nations Charter with virtually no debate, Congress has been doing a kind of penance for its prewar isolationism, and that penance has sometimes taken the form of overly hasty acquiescence in proposals for the acceptance of one form or another of international responsibility. Congress, it seems clear, was deficient in vision during the 1920's and 1930's, but so were Presidents Harding, Coolidge, Hoover, and—prior to 1938—Roosevelt. Just as no one has a monopoly on vision, no one has a monopoly on myopia either. In its deference to the executive in foreign affairs, Congress has conceded him, and the experts around him, a kind of infallibility which the wisest among them would readily acknowledge they do not have. Versailles, like Munich, has conveyed more lessons than were in it; its only lesson, as far as the workings of the American government are concerned, is the need not of congressional diffidence but of congressional responsibility—and the same counsel could profitably be heeded by the executive as well.

Returning to our chronology, we can detect the ambivalence about the executive's control of the armed forces in events of the post-World War II period.

Article 5 of the NATO treaty commits the signatories to regard an armed attack against any one member as an attack on all. In its report on the treaty the Senate Foreign Relations Committee said:

* * * Would the United States be obligated to react to an attack on Paris or Copenhagen in the same way it would react to an attack on New York City? In such an event does the treaty give the President the power to take any action without specific congressional authorization which he could not take in the absence of the treaty? The answer to both of these questions is “No.”

The committee report also stated:

* * * The committee does not believe it appropriate in this report to undertake to define the authority of the President to use the armed forces. Nothing in the treaty, however, including the provision that an attack against one shall be considered an attack against all, increases or decreases the constitutional powers of either the President or the Congress or changes the relationship between them.¹⁵

In a report to President Truman on April 7, 1949, Secretary of State Acheson agreed with the Foreign Relations Committee's interpretation of article 5:

This does not mean that the United States would automatically be at war if we or one of the other parties to the treaty were attacked. Under the Constitution, the Congress alone has the power to declare war. The United States would be obligated by the treaty to take promptly the action which it deemed necessary to restore and maintain the security of the North Atlantic area. That

¹⁴ “U.S. Commitments to Foreign Powers,” p. 20.

¹⁵ “North Atlantic Treaty,” Report of Committee on Foreign Relations on Ex. L. U.S. Senate, 81st Cong., first sess. (Washington: U.S. Government Printing Office, 1949), p. 8.

decision as to what action was necessary would naturally be taken in accordance with our constitutional processes.¹⁶

There seems to have been general agreement that the United Nation's Charter, the NATO Treaty, and the other postwar security treaties did not change the relative powers of Congress and the President with respect to the use of the Armed Forces. There was little agreement, however, on what exactly those relative powers were—not, in the committee's opinion, because there could be any real doubt on constitutional grounds but because, as the trend toward executive control accelerated, constitutional considerations were neglected and the *de facto* power of the President came to be accepted as a constitutional power. As E. S. Corwin wrote in 1949, in many American minds—

* * * the President's power to repel sudden attacks had developed into an undefined power * * * to employ without congressional authorization the Armed Forces in the protection of American rights and interests abroad whenever necessary.¹⁷

Dr. Russell comments:

* * * The intriguing aspect of this new interpretation of the constitutional division of powers is that it occurred at a point in American history when the older, specific categories under which force had been used by Presidents had disappeared. The right to intervene in Latin America was no longer maintained and the right to protect lives and property by armed force had been renounced. The areas where Presidents wished to use armed force were no longer primitive nations, but major powers against whom the use of armed force could not be easily disguised as anything but acts of war. If Presidents wished to exercise the power to use armed force abroad for general purposes without the consent of Congress they needed to assert a broader explanation of the President's constitutional authority than the right to use armed force in all cases except acts of war. What they needed to establish complete independence from congressional control was to assert that the President had a general constitutional power to use armed force to protect U.S. "interests" or "security." With no established limits on when Presidents might use force or on the quantity used, there would be no need to go to Congress.¹⁸

President Truman committed American Armed Forces to Korea in 1950 without Congressional authorization. Congressional leaders and the press were simultaneously informed of the decision but the decision had already been made.

President Truman himself made no public explanation of his use of the war power but an article in the Department of State Bulletin asserted that "the President, as Commander in Chief of the Armed Forces of the United States, has full control over the use thereof." The article pointed to past instances in which the President had used the Armed Forces in what was said to be "the broad interests of American foreign policy" and also asserted that there was a "traditional power of the President to use the Armed Forces of the United States without consulting Congress."¹⁹ Here, clearly expostulated, is a doctrine of general or "inherent" Presidential power—something which had not been claimed by previous Presidents.

Scarcely a voice of dissent was raised in Congress at the time of Truman's action. Senator Watkins of Utah questioned the authority of the President to commit the country to war without consulting

¹⁶ *A Decade of American Foreign Policy, Basic Documents 1941-49*, 81st Cong., first sess., Doc. No. 123, prepared for Senate Foreign Relations Committee by committee staff and Department of State (Washington: U.S. Government Printing Office, 1950), p. 1337.

¹⁷ Edward S. Corwin, "Who Has the Power To Make War?" *New York Times Magazine*, July 31, 1949, p. 14.

¹⁸ *The United States Congress and the Power to Use Military Forces Abroad*, p. 389.

¹⁹ *Department of State Bulletin*, vol. 23, No. 578, July 31, 1950, pp. 173-177.

Congress, even in compliance with a recommendation of the United Nations Security Council, and said that, if he were President, he “* * * would have sent a message to the Congress of the United States setting forth the situation and asking for authority to go ahead and do whatever was necessary to protect the situation.”²⁰ In January 1951 Senator Taft said that President Truman had no authority whatever to commit American troops to Korea without consulting Congress and without congressional approval. “The President,” he said, “simply usurped authority, in violation of the laws and the Constitution, when he sent troops to Korea to carry out the resolution of the United Nations in an undeclared war.”²¹

In 1951 the Senate Committees on Foreign Relations and Armed Services held joint hearings to discuss President Truman’s plan for sending six divisions of American soldiers to Europe. Secretary of State Acheson gave the committees the following interpretation of the President’s powers:

Not only has the President the authority to use the Armed Forces in carrying out the broad foreign policy of the United States and implementing treaties, but it is equally clear that this authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution.

Acheson thought it inappropriate even to discuss constitutional matters:

We are in a position in the world today where the argument as to who has the power to do this, that, or the other thing, is not exactly what is called for from America in this very critical hour.²²

President Eisenhower exhibited some ambivalence as to his authority to use the Armed Forces. He conceded the authority of Congress, for example in the following statement at a press conference on March 10, 1954:

There is going to be no involvement of America in war unless it is a result of the constitutional process that is placed upon Congress to declare it. Now let us have that clear * * *.²³

But, in asking Congress for “presidential authority to use American Armed Forces to protect Formosa and the Pescadores,” he said:

Authority for some of the actions which might be required would be inherent in the authority of the Commander in Chief. Until Congress can act I would not hesitate, so far as my constitutional powers extend, to take whatever emergency action might be forced upon us in order to protect the rights and security of the United States.

However, a suitable congressional resolution would clearly and publicly establish the authority of the President as Commander in Chief to employ the Armed Forces of this Nation promptly and effectively for the purposes indicated if in his judgment it became necessary.²⁴

The burden of President Eisenhower’s message seems to have been that, although he regarded himself as having some authority to dispose of the Armed Forces, he did not regard it as entirely certain that he did have it or in what amount. It was, presumably, in order

²⁰ *Congressional Record*, 81st Cong., second sess., vol. 96, pt. 7, Senate, June 27, 1950, pp. 9229–9233.

²¹ *Congressional Record*, 82d Cong., first sess., vol. 97, pt. 1, Senate, Jan. 5, 1951, p. 37.

²² Assignment of Ground Forces of the United States to Duty in the European Area,” *Hearing by Committees on Foreign Relations and Armed Services*, U.S. Senate, 82d Cong., first sess., on S. Con. Res. 8, Feb. 1–28, 1951 (Washington: U.S. Government Printing Office, 1951), pp. 92–93.

²³ *Public Papers of the Presidents of the United States: Eisenhower, 1954* (Washington: U.S. Government Printing Office, 1960), p. 306.

²⁴ *Congressional Record*, 84th Cong., first sess., vol. 101, pt. 1, Senate, Jan. 24, 1955 p. 601.

to put this authority on an unquestionable basis that he asked for a congressional resolution.

It is significant that in the case of the Formosa resolution President Eisenhower asked for *authority* rather than mere approval or support and that under the resolution adopted by Congress the President was "*authorized* to employ the Armed Forces", upon his own finding of necessity, for the defense of Formosa and the Pescadores. The use of the word *authorize* by both President and Congress strongly implied recognition by both that the authority to commit the armed forces lay with the Congress, to grant or withhold. The committee emphasizes this point as one which may have significance in possible future congressional action on resolutions pertaining to the use of the Armed Forces.

Although the word *authorize* was used in the Formosa resolution, the authorization was an extremely broad one, empowering the President to employ the Armed Forces to defend Formosa and the Pescadores "as he determines necessary." It can be argued that an authorization so general and imprecise amounts to an unconstitutional alienation of its war power on the part of the Congress. Indeed, Senate opposition to the Formosa resolution centered on the contention that the language of the resolution sought to enable the President to wage war without a declaration of war by Congress. During the debate on the resolution Senator Morse said that, "under the Constitution of the United States, no President has the right to commit an act of war against a sovereign power."²⁵

Subsequent resolutions involving the possible use of armed force abandoned the principle of *authorizatoin*, demonstrating not only ambivalence as to the extent of the President's authority but a lack of attention to the underlying constitutional question. The Middle East resolution of 1957, the Cuba resolution of 1962, and the Gulf of Tonkin resolution of 1964 dropped the vital concept of congressional authorization and instead used terminology which, by failing to express a grant of power by Congress, implied acceptance of the view that the President already had the power to use the Armed Forces in the ways proposed and that, the resolutions were no more than expressions of congressional support and national unity. The prevailing attitude in each instance seems to have been one of concern not with constitutional questions but with the problem at hand and with the need for a method of dealing with it, heightened in all three cases by a sense of urgency. Nonetheless, precedents were set.

The debate on the Middle East resolution of 1957 revealed two dominant attitudes on the war power; first, a reluctance to define it with precision, and, second, growing senatorial acceptance of the view that the President, in his capacity as Commander in Chief, could commit the Armed Forces to defend what he might regard as the "vital interest" of the nation. In testimony before the Committees on Foreign Relations and Armed Services, Secretary of State Dulles refused to express an opinion as to whether or not the President could commit the Armed Forces in the absence of the resolution. Senator Fulbright, whose view has changed with time and experience, thought at the time that the President had power as Commander in Chief to

²⁵ *Congressional Record*, 84th Cong., first sess., vol. 101, pt. 1, Senate, Jan. 24, 1955, p. 766.

use the Armed Forces to defend the "vital interests" of the country and that the resolution would have the effect of limiting that power.²⁶ This viewpoint was widely shared at the time. In their report the two committees struck out the word "authorize" and expressed satisfaction at having avoided the necessity of defining the relative powers of Congress and the President.²⁷ The debate on the floor of the Senate showed preponderant, but far from unanimous, support for this expansive view of Presidential authority.²⁸ The final resolution said that, "if the President determines the necessity thereof, the United States is prepared to use armed force" to defend Middle Eastern nations against Communist aggression, "provided that such employment shall be consonant with the treaty obligations of the United States and with the Constitution of the United States." What exactly was thought to be required for the use of force to be "consonant with the Constitution" was by this time more obscure than ever. When President Eisenhower sent 14,000 American troops to Lebanon in 1958, he said that they were being sent "to protect American lives and by their presence there to encourage the Lebanese Government in defense of Lebanese sovereignty and integrity." No reference was made to the resolution of the previous year.

In September 1962 Congress adopted a joint resolution pertaining to Cuba. The Kennedy administration favored a concurrent resolution expressing the sense of Congress that the President "possesses all necessary authority" to prevent Cuba, "by whatever means may be necessary, including the use of arms," from "exporting its aggressive purposes" in the hemisphere, to prevent the establishment of a foreign, i.e., Soviet, military base in Cuba, and to support Cuban aspirations for self-determination. Senator Russell opposed the concurrent resolution favored by the administration. "I do not believe," he said, "that the Armed Services Committee is going to make a constitutional assertion that the President of the United States has the right to declare war, and that is what this does,"²⁹ The resolution as finally adopted was a joint resolution, stating that "the United States is determined to do those things spelled out in the abandoned concurrent resolution.

The Cuban missile crisis occurred 1 month later. Two hours before he went on television on October 22, 1962, to announce the "quarantine" on shipments of offensive missiles to Cuba, President Kennedy met with the congressional leadership and briefed them on the decisions which had, of course, already been made. In the belief that they had a *duty* to give the President their best judgment, certain Senators expressed opinions as to possible wise courses of action. This was the extent of congressional participation in the greatest crisis of the postwar era, the one crisis which brought the world to the brink of nuclear war. Finding the congressional advice in some cases "captious and inconsistent," Theodore Sorensen later wrote that the President's

²⁶ "The President's Proposal on the Middle East," Hearings before the Committees on Foreign Relations and Armed Services, U.S. Senate, 85th Cong., first sess., Jan. 14 to Feb. 11, 1957 (Washington: U.S. Government Printing Office, 1957), pp. 111-119.

²⁷ "To Promote Peace and Stability in the Middle East," S. Rept. No. 70, 85th Cong., first sess. (Washington: U.S. Government Printing Office, 1957), p. 9.

²⁸ Russell, *The United States Congress and the Power To Use Military Force Abroad*, pp. 416-420.

²⁹ "Situation in Cuba," *Hearings before the Senate Foreign Relations and Armed Services Committees*, U.S. Senate, 87th Cong., second sess., September 1962 (Washington: U.S. Government Printing Office, 1962), p. 72.

meeting with the congressional leadership was the "only sour note of the day."³⁰

Little was said about constitutional considerations in the hearings on the Gulf of Tonkin resolution held before the Senate Committees on Foreign Relations and Armed Services in August 1964. It was generally agreed at the time, as Senator Fulbright put it, that the resolution "would authorize whatever the Commander in Chief feels is necessary."³¹ In the discussion on the floor, Senator Cooper asked: "Then, looking ahead, if the President decided that it was necessary to use such force as could lead into war, we will give that authority by this resolution?" Senator Fulbright replied: "That is the way I would interpret it."³² The resolution as adopted made no reference to an authorization but declared that "* * * the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression" and that "* * * the United States is, therefore, prepared as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia on Foreign Relations and Armed Services in August 1964. It was freedom."³³

The Gulf of Tonkin resolution represents the extreme point in the process of constitutional erosion that began in the first years of this century. Couched in broad terms, the resolution constitutes an acknowledgment of virtually unlimited Presidential control of the Armed Forces. It is of more than historical importance that the Congress now ask itself why it was prepared to acquiesce in the transfer to the executive of a power which, beyond any doubt, was intended by the Constitution to be exercised by Congress.

Several answers suggest themselves:

First, in the case of each of the resolutions discussed, Congress was confronted with a situation that seemed to be urgent and, lacking firm historical guidelines for the discharge of its foreign policy responsibilities in a real or seeming emergency, it acquiesced in an expedient which seemed to meet the needs of the moment, the foremost which at the time of each of the resolutions seemed to be an expression of national unity. In the case of the Gulf of Tonkin resolution, the Senate responded to the administration's contention that the effect of the resolution would be lost if it were not enacted quickly. The desired effect was a resonating expression of national unity and support for the President at a moment when it was felt that the country had been attacked. In order, therefore, to avoid the delay that would arise from a careful analysis of the language of the resolution had to go to a Senate-House conference to reconcile differing versions, the Foreign Relations Committee and the entire Senate speedily approved the resolution in the language in which it had already been adopted by the House of Representatives. The prevailing attitude was not so much that Congress

³⁰ *Kennedy* (New York: Harper & Row, 1965), p. 702.

³¹ *Congressional Record*, 88th Cong., second sess., vol. 110, pt. 14, Senate, Aug. 5, 1964, p. 18403.

³² *Congressional Record*, 88th Cong., second sess., vol. 110, pt. 14, Senate, Aug. 6, 1964, p. 18409.

³³ "Southeast Asia Resolution," Joint Hearing before the Committee on Foreign Relations and the Committee on Armed Services, U.S. Senate, 88th Cong., second sess., on S.J. Res. 189 (Washington: U.S. Government Printing Office, 1966), pp. 1-2.

was granting or acknowledging the executive's authority to take certain actions but that it was expressing unity and support for the President in a moment of national crisis and, therefore, that the exact words in which it expressed those sentiments were not of primary importance.

Second, in the course of two decades of cold war the country and its leaders became so preoccupied with questions of national security as to have relatively little time or thought for constitutional matters. Insofar as the question of authority to commit the country to war was thought of at all, the general attitude was one of acceptance of the power of the President, in his capacity as Commander in Chief, to commit the Armed Forces to at least limited war. At the same time Congress showed a marked reluctance to attempt to define the constitutional division of authority between the President and Congress in matters of war and peace. More important, however, than what was thought about the war power was the paucity of thought about it.

Third, in the case of the Gulf of Tonkin resolution, there was a discrepancy between the language of the resolution and the intent of Congress. Although the language of the resolution lends itself to the interpretation that Congress was consenting in advance to a full-scale war in Asia should the President think it necessary, that was not the expectation of Congress at the time. In adopting the resolution Congress was closer to believing that it was helping to *prevent* a large-scale war by taking a firm stand than that it was laying the legal basis for the conduct of such a war. When Congress declared war on Japan on December 8, 1941, it expected and intended that the full military power of the United States would be brought to bear against Japan. When Congress adopted the Gulf of Tonkin resolution, it had no such expectation. Its expectations were shaped by events outside of the formal legislative record, notably the national election campaign then in progress, in which President Johnson's basic position as to Vietnam was expressed in his assertion "* * * we are not about to send American boys 9,000 or 10,000 miles away from home to do what Asian boys ought to be doing for themselves."³⁴ It is difficult, therefore, to credit Under Secretary of State Katzenbach's contention that the Gulf of Tonkin resolution, combined with the SEATO Treaty, was the "functional equivalent" of a declaration of war.³⁵ In adopting a resolution with such sweeping language, however, Congress committed the error making a *personal* judgment as to how President Johnson would implement the resolution when it had a responsibility to make an *institutional* judgment, first, as to what *any* President would do with so great an acknowledgment of power, and, second, as to whether, under the Constitution, Congress had the right to grant or concede the authority in question.

From the executive's point of view these questions are academic, because every President since World War II has asserted at one time or another that he had the authority to commit the Armed Forces to conflict without the consent of Congress. The Johnson administration was not entirely consistent in its interpretations of the Gulf of Tonkin resolution, but on a number of occasions it was asserted that the President would have full authority to conduct the war in Vietnam on its

³⁴ Remarks in Memorial Hall, Akron University, Akron, Ohio, Oct. 21, 1964.

³⁵ "U.S. Commitments to Foreign Powers," p. 82.

full scale even in the absence of the resolution. In March 1966, for example, the Legal Adviser to the Department of State wrote:

There can be no question in present circumstances of the President's authority to commit U.S. forces to the defense of South Vietnam. The grant of authority to the President in Article II of the Constitution extends to the actions of the United States currently undertaken in Vietnam.³⁶

Speaking of the Gulf of Tonkin resolution in his news conference on August 18, 1967, President Johnson said:

* * * We stated then, and we repeat now, we did not think the resolution was necessary to do what we did and what we're doing. But we thought it was desirable and we thought if we were going to ask them [Congress] to stay the whole route and if we expected them to be there on the landing we ought to ask them to be there on the takeoff.³⁷

The exact view of the executive as to the meaning of Congress constitutional power to "declare war" remains somewhat obscure. In his testimony before the Foreign Relations Committee on August 17, 1967, Under Secretary Katzenbach referred to a declaration of war as something which is "outmoded in the international arena" and also as something that would not "correctly reflect the limited objectives of the United States with respect to Vietnam."³⁸ The Under Secretary thought that, in any case, the SEATO Treaty and the Gulf of Tonkin resolution, taken together, were the "functional equivalent" of a declaration of war, and he asked: "What could a declaration of war have done that would have given the President more authority and a clearer voice of the Congress of the United States than that did?"³⁹ The Gulf of Tonkin resolution, he said, was "as broad an authorization for the use of armed forces for a purpose as any declaration of war so-called could be in terms of our internal constitutional process."⁴⁰ Mr. Katzenbach also said, however, that he did not wish to be understood as having said that the Gulf of Tonkin resolution was tantamount to a declaration of war. "We did not declare war," he said. "Our objectives are limited. We are there for a limited purpose."⁴¹

The burden of the Under Secretary's remarks seems to have been, first, that the Gulf of Tonkin resolution was not a declaration of war but its "functional equivalent," and, second, that declarations of war are inappropriate when the nation's purposes are "limited" and in any case are "outmoded in the international arena." The committee has difficulty reconciling these various observations with each other, much less divining their basis in the Constitution. The committee is reluctant to believe that the executive feels itself free to alter on its own authority a provision of the Constitution which it believes to be "outmoded in the international arena." Nor can the committee accept the view that "limited" wars can be undertaken by the executive without the consent of Congress; neither the Constitution nor the conduct of American Presidents prior to 1950—with one or two possible exceptions—justify that interpretation of the Constitution. It is obvious that the question of authority to commit the United States to war is in need of clarification.

³⁶ Leonard C. Meeker, "The Legality of United States Participation in the Defense of Vietnam," *The Department of State Bulletin*, Mar. 28, 1966, p. 484.

³⁷ *New York Times*, Aug. 19, 1967, p. 10.

³⁸ "U.S. Commitments to Foreign Powers," p. 81.

³⁹ *Ibid.*, pp. 81, 83.

⁴⁰ *Ibid.*, p. 89.

⁴¹ *Ibid.*, pp. 88–89.

One final occurrence must be mentioned to complete our chronology. On April 28, 1965, after consulting his advisers and briefing the leaders of Congress, President Johnson sent American Armed Forces to the Dominican Republic. As in the instances of Korea in 1950 and Lebanon in 1958, American forces were sent to a foreign country without reference to any resolution or other act or expression of Congress. The congressional leadership were informed but that cannot be equated with obtaining the consent of Congress.

Great emphasis has been placed by the Executive on its diligence in "informing" and "consulting" the Congress on foreign policy decisions. "Consistently," says the Department of State in its comments of March 10, 1969, on Senate Resolution 85, "Congress is informed and consulted concerning both the implementation of existing commitments and policy and the planning of new initiatives." Unfortunately, the terms "consult" and "inform" are used interchangeably, although the distinction between solicitation of advice in advance of a decision and the provision of information in the wake of a decision would seem to be a significant one. In fact, recent administrations have been fairly conscientious about "informing" the congressional leadership—although not the Congress itself—of their foreign policy decisions. In the case of both the Cuban missile crisis and the Dominican intervention, for example, congressional leaders were notified of the course of action decided upon by the Executive a few hours before those decisions were made public and implemented. Such acts of courtesy are always to be welcomed; the Constitution, however, envisions something more. Specifically, in matters involving the commitment of the Armed Forces to hostilities abroad, the Constitution requires that the consent of Congress be obtained in advance of action by the executive.

The Nixon administration has not yet spelled out its position on the war power although the State Department's comments on Senate Resolution 85 suggest, at least in a preliminary way, that the new administration's basic position will not differ from that of its predecessors. The committee takes particular note of the following assertion in those comments:

As Commander in Chief, the President has the sole authority to command our Armed Forces, whether they are within or outside the United States. And, although reasonable men may differ as to the circumstances in which he should do so, the President has the constitutional power to send U.S. military forces abroad without specific congressional approval.

President Nixon's four immediate predecessors—Eisenhower a shade less than the others—all asserted unrestricted executive authority to commit the Armed Forces without the consent of Congress, and Congress, for the most part, has acquiesced in the transfer of its war power to the executive. The evolution traced in these pages is the basis of the committee's contention that the intent of the framers of the Constitution with respect to the exercise of the war power has been virtually nullified. This has come about in large part by inadvertency in a period of anxiety over our national security. It is important that we take note of the great change which has taken place and of the reasons for it, so that we can judge whether we wish to retain the *status quo* and perhaps legitimize it by constitutional amendment or, alternately, try to restore and adapt to modern conditions the arrangement of powers contemplated in the Constitution.

5. TREATIES AND COMMITMENTS

Great confusion has arisen in recent decades as to what exactly is required to make a formal, binding commitment. The traditional distinction between the treaty as the appropriate means of making significant political commitments and the executive agreement as the appropriate instrument for routine, nonpolitical arrangements has substantially broken down. The term "commitment" is now used to refer to engagements ranging from those contracted by treaties consented to by the Senate to executive agreements and even simple declarations. The latter are sometimes made in a casual, even heedless, way, often by officials subordinate to the President himself, and they seem at time to be made with something less than full consciousness of their implications. Sometimes the sense of binding commitment arises out of a series of executive declarations, no one of which in itself would be thought of as constituting a binding obligation. Simply by repeating something often enough with regard to our relations with some particular country, we come to suppose that our honor is involved in an engagement no less solemn than a duly ratified treaty. This is perhaps best described as a process of commitment by accretion.

Consider, for example, the widely held view that the United States is committed to the defense of Israel even though we have no security treaty with that country. The course of this alleged commitment is in fact nothing more than a long series of executive policy declarations, including: President Truman's declaration of support for the independence of Israel in 1948; the British-French-American tripartite declaration of 1950 pledging opposition to the violation of frontiers or armistice lines in the Middle East; President Eisenhower's statement of January 1957 pledging American support for the integrity and independence of Middle Eastern nations; Secretary of State Dulles' assertion of February 1957 that the United States regarded the Gulf of Aquaba as an international waterway; President Kennedy's press conference of March 1963 pledging American opposition to any act of aggression in the Middle East; and President Johnson's statement of February 1964 indicating American support for the territorial integrity and political independence of all Middle Eastern countries.

All of these declarations are executive policy statements; not one is based on a treaty ratified by the Senate. The only treaty commitment the United States has in the Middle East is as a signatory to the United Nations Charter, under which the United States is obligated to support and help implement any action which the United Nations make take. It is not the committee's position that the United States ought not to come to the support of Israel should it be the victim of aggression. It is the committee's position that, should so significant an obligation be incurred, it ought to be the result of a treaty or other appropriate legislative instrumentality.

The very habit of being leaders of a great world power seems to have nourished our leaders' penchant for commitment by executive declaration. In a now famous statement to the Senate Preparedness Subcommittee on August 25, 1966, Secretary of State Rusk declared: "No would-be aggressor should suppose that the absence of a defense treaty, congressional declaration, or U.S. military presence grants

immunity to aggression.”⁴² The Secretary’s statement was meant, presumably, to convey a warning to potential aggressors. Whatever its impact on foreign powers, the Secretary’s statement also conveyed a warning—a most ominous one—to Congress. In effect, it put the Congress on notice that, with or without its consent, treaty or no treaty, the executive claimed the right to act as it saw fit against any nation it might judge to be an aggressor. Hardly less celebrated is Vice President Humphrey’s television interview of April 19, 1966, in which he referred to the Honolulu declaration resulting from the meeting 2 months before between President Johnson and General Ky of South Vietnam as nothing less than “a pledge to ourselves and to posterity to defeat aggression, to defeat social misery, to build viable, free political institutions, and to achieve peace * * *.” Acknowledging these to be “great commitments,” the Vice President continued: “* * * I think there is a tremendous new opening here for realizing the dream of the Great Society in the great area of Asia, not just here at home.”⁴³

It seems most unlikely that Vice President Humphrey, Secretary of State Rusk, or any other high official ever intended to assert unprecedented executive powers or to enunciate some new constitutional doctrine. It seems far more likely that, in their deep concern with the exigencies of our foreign relations, they gave no thought to the internal, constitutional implications of their various pronouncements. Inadvertent though it may have been, the effect of these pronouncements is to assert executive authority in areas hitherto reserved to the legislature—the “functional equivalent,” as it were, of amendments to the Constitution.

The denigration of treaties goes back at least to President Franklin Roosevelt’s destroyer deal of 1940, referred to in section 3 above. It seems unlikely that President Roosevelt wished to usurp the Senate’s treaty power in exchanging the overaged American destroyers for British bases in the Western Hemisphere; he acted to help avert what then seemed the imminent danger of a German invasion of Great Britain. More serious in the long run than the President’s action was the preparation of a brief by the Attorney General contending that the action was constitutional. Had the President publicly acknowledged his incursion on the Senate’s treaty power and explained it as an emergency measure, a damaging constitutional precedent would have been averted. Instead, a spurious claim of constitutionality was made, compounding the incursion on the Senate’s authority into a precedent for future incursions.

The destroyer deal was followed by a long series of important new commitments incurred by executive agreement or declaration. Each one of these set precedent for further Presidential takeover of the Senate’s treaty powers, until now, with apparent sincerity, the executive regards the resulting imbalance as the appropriate, historically sanctioned distribution of constitutional powers. So far has this process advanced that treaties can now be regarded as no more than one of several available means of making significant foreign commitments. From the congressional viewpoint the question then arises as to what the real significance of a treaty now is. The answer seems to

⁴² “Worldwide Military Commitments,” *Hearings Before the Preparedness Investigating Subcommittee of the Committee on Armed Services*, U.S. Senate, 89th Cong., second sess., pt. 1 (Washington: U.S. Government Printing Office, 1966), p. 9.

⁴³ “A Conversation with Hubert Humphrey,” CBS News special report, Apr. 19, 1966.

be that treaties have come to be regarded as appropriate primarily in those instances, such as the Nuclear Test Ban and the Nonproliferation Treaty, in which a special aura of dignity or solemnity is judged to be desirable.

In some instances we have come close to reversing the traditional distinction between the treaty as the instrument of a major commitment and the executive agreement as the instrument of a minor one. In 1967, for example, the Senate considered and gave its approval to a tax treaty with Thailand. At no time, however, has a treaty or any other legislative instrumentality been put before Congress with regard to the 50,000 American troops now in Thailand, many of whom are engaged in military support operations against insurgency. The submission of a tax arrangement to the Senate as a treaty is necessary and proper; the dispatch of large numbers of American troops to an area of warfare or potential warfare is also a matter requiring congressional authorization, involving, as it does, both the treaty power and the war powers of Congress.

Here again is an instance of "commitment by accretion." The SEATO Treaty obligates the United States to Thailand in two specific ways: Should Thailand be attacked, the United States is committed to "act to meet the common danger in accordance with its constitutional processes;" should Thailand be threatened by subversion, the United States and the other treaty signatories would be obligated to "consult immediately in order to agree on the measures which shall be taken for the common defense." The presence of American troops, however, combined with Thailand's involvement in the Vietnam war, have given rise to a commitment—or the conviction of a commitment—going far beyond the SEATO Treaty. On March 6, 1962, for example, Secretary of State Rusk and Thai Foreign Minister Thanat Khoman issued a joint declaration in which Mr. Rusk expressed "the firm intention of the United States to aid Thailand, its ally and historic friend, in resisting Communist aggression and subversion." Clearly, this declaration, and subsequent declarations in similar vein, amount to a commitment far exceeding that defined in the SEATO Treaty. Testifying on that treaty before the Senate Foreign Relations Committee in 1954, Secretary of State John Foster Dulles referred to possible Communist subversion in Vietnam or Thailand as a "very grave threat to us." But, he added, "we have no undertaking to put it down; all we have is an undertaking to consult together as to what to do about it."⁴⁴

Some foreign engagements, such as our bases agreement with Spain, form a kind of quasi-commitment, unspecified as to their exact import but, like buds in springtime, ready, under the right climatic conditions, to burst into full bloom. Under the executive agreement of 1953, an attack on the joint Spanish-American facilities would be regarded as a "matter of common concern." In practice the very fact of our physical presence in Spain constitutes a quasi-commitment to the defense of the Franco regime, possibly even against internal disruptions. At some point the distinction between defending American lives and property and defending the host government would be likely to become academic, if not to disappear altogether. This possibility is

⁴⁴ "The Southeast Asia Collective Defense Treaty," *Hearing Before the Committee on Foreign Relations, U.S. Senate, 83d Cong., second sess., on Ex. K, 83d Cong., second sess.* (Washington: U.S. Government Printing Office, 1950), p. 28.

much enhanced by the fact that, under the executive agreement of 1953, the bases are maintained "jointly" by the United States and Spain, are subject to use by Spain without American consent, and almost certainly would be utilized by the Franco regime in an emergency. It is not difficult to envision a situation in which the need to protect American servicemen would lead to large-scale military intervention in Spain and, as a result, to another military enterprise unauthorized by Congress.

Recent negotiations for the renewal of the executive agreement have raised the possibility of an "upgrading" of the language of the agreement, or, failing that, of a more expansive interpretation of the meaning of the old language. In fact the language of the executive agreement of 1953 was substantially "upgraded" by the joint declaration signed by Secretary of State Dean Rusk and Spanish Minister for Foreign Affairs Don Fernando Maria Castiella on September 26, 1963, concerning the renewal of the defense agreement. In that joint declaration it is asserted that :

The United States Government reaffirms its recognition of the importance of Spain to the security, well-being and development of the Atlantic and Mediterranean areas. The two governments recognize that the security and integrity of both the United States and Spain are necessary for the common security. A threat to either country, and to the joint facilities that each provides for the common defense, would be a matter of common concern to both countries, and each country would take such action as it may consider appropriate within the framework of its constitutional processes.

More recently, in the fall of 1968, a high American military official provided Spanish authorities with a memorandum further "upgrading" the American commitment. Being classified, that memorandum can not be quoted. It asserts, however, that the presence of American Armed Forces in Spain constitutes a more significant security guarantee to Spain than would a written agreement.

These declarations are virtually commitments on the part of the United States to come to the defense of Spain. In the committee's view, a military commitment to Spain could only be binding on the United States if it were the result of a treaty approved by the Senate. The making of such a commitment by means of an executive agreement, or a military memorandum, has no valid place in our constitutional law, and constitutes a usurpation of the treaty power of the Senate. The committee notes with approval Secretary Rogers' statement before it on March 28, 1969, to the effect that the existing commitment to Spain is not to be upgraded and that the committee in any case will be advised before a final agreement is concluded. The committee stresses, however, that, if the joint declaration of September 26, 1963, or the military memorandum of the fall of 1968, is to be regarded as a binding commitment of the United States, it can only be made so by a duly ratified treaty.

One administration official is reported to have suggested that a new agreement with Spain on the meaning of the old arrangement might be "private but not secret." The meaning of such language totally escapes the committee, but the meaning of a commitment and the difference between having one and not having one is very clear to the committee. In a delicate international negotiation it may well be thought desirable to obscure such critical distinctions. The Constitution of the United States, however, does not provide for such expe-

diential ambiguities. It requires clarity and legality, both as to the existence of foreign commitments and the means by which they are incurred. It is the committee's expectation that the executive will bear this requirement in mind, both in its negotiations with Spain and in all other such arrangements.

6. CONCLUSION : THE RESTORATION OF CONSTITUTIONAL BALANCE

At two separate places in its comments of March 10, 1969, on Senate Resolution 85, the Department of State makes the point that a Senate resolution cannot change the constitutional powers of the President. The committee is grateful for what the Department appears to regard as useful instruction in constitutionality. In fact, however, the committee had prior awareness of the difference between a constitutional amendment and a sense-of-the-Senate resolution. Had it wished to alter the Constitution, the committee would have written an appropriate amendment to be submitted to the two Houses of Congress and to the State legislatures. The purpose of Senate Resolution 85, however, is not to alter the Constitution but to restore it. The resolution is perhaps best understood as an invitation to the executive to reconsider its excesses, and to the legislature to reconsider its omissions, in the making of foreign policy, and, in the light of such reconsideration, to bring their foreign policy practices back into compliance with that division of responsibilities envisioned by the Constitution and sanctioned by over a century of usage.

The committee is strongly of the view that a restoration of the division of war powers specified by the Constitution and generally adhered to during more than a century of national experience is both compatible with modern conditions and essential to constitutional government. The committee is equally convinced that, whatever is done either to adjust or confirm the existing relationship between executive and legislative branches in decisions of war and peace, it should be done deliberately and in accordance with the constitutional procedures. Whether one approves or disapproves the present division of authority, it is difficult to deny that it has come about as the result of erosion, inadvertency, expediency, and—in a few instances—usurpation.

Claims to unlimited executive authority over the use of armed force are made on grounds of both legitimacy and necessity. The committee finds both sets of contentions unsound.

The argument for legitimacy is based on a misreading of both the Constitution and the experience of American history. A careful study of the Constitution and of the intent of the framers as set forth in the extensive documentation which they bequeathed to us leaves not the slightest doubt that, except for repelling sudden attacks on the United States, the founders of our country intended decisions to initiate either general or limited hostilities against foreign countries to be made by the Congress, not by the executive. Far from altering the intent of the framers, as is sometimes alleged, the practice of American Presidents for over a century after independence showed scrupulous respect for the authority of the Congress except in a few instances. The only uses of military power that can be said to have legitimately accrued to the executive in the course of the nation's history have been for

certain specific purposes such as suppressing piracy and the slave trade, "hot pursuit" of fugitives, and, as we have noted, response to sudden attack. Only in the present century have Presidents used the Armed Forces of the United States against foreign governments entirely on their own authority, and only since 1950 have Presidents regarded themselves as having authority to commit the Armed Forces to full-scale and sustained warfare.

Failing of constitutional and historical legitimacy, the cause for unlimited executive power over the Armed Forces has final resort to the spurious and dangerous doctrine of "inherent powers of the Presidency." This doctrine, variously based on claims to "implied," "incidental," "plenary," or "emergency" powers, is without foundation in our Constitution or constitutional law. The 10th amendment states that powers not delegated to the federal government are reserved to the States or the people, leaving no residue of "inherent" Presidential powers. The doctrine of "inherent" or "emergency" powers was explicitly rejected by the Supreme Court when it ruled illegal President Truman's seizure of the steel mills during the Korean war. "The founders of this nation," said the Court, "entrusted the lawmaking power to the Congress alone in both good and bad times."⁴⁵ Perhaps the most eloquent pronouncement against the doctrine of emergency powers was made by Justice Cardozo in 1935:

Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary.⁴⁶

The case for necessity in the exercise of "inherent" presidential power is hardly less spurious than that for legitimacy. We have already noted the defects of the contention that only experts are qualified to deal with the complexities of foreign policy.⁴⁷ The other principal argument made in support of emergency powers over foreign policy is the necessity of speed in response to a grave threat to the nation's security or survival. To this the committee has two responses:

First, a useful distinction can be made between speed and haste. In a number of situations in recent years which were characterized as emergencies, American policy would have profited from brief delays to permit deliberation and consultation with the Congress. In the case of the joint resolutions adopted by Congress pertaining to Formosa, the Middle East, Cuba, and the Gulf of Tonkin, not one was a matter of the greatest urgency although that did not in each case seem clear at the time. In the case of the Gulf of Tonkin resolution, a delay of a week or two would have permitted Congress both to ascertain the facts regarding the occurrence in the Gulf of Tonkin and to record its intentions in a legislative record; the retaliatory attacks on the North Vietnamese ports had already been made when the resolution was put before Congress, so that a delay would have had no military consequences.

⁴⁵ *Youngstown Co. v. Sawyer*, 1952, 343 U.S. 589.

⁴⁶ *Schechter Poultry Corp. v. United States*, 1935, 295 U.S. 495.

⁴⁷ See p. 16.

Second, the committee is well aware that there have been, and may in the future again be, instances of great national emergency such as the Cuban missile crisis when prompt action is essential. In such instances consultation with the Congress is by no means out of the question; Congress has demonstrated on many occasions that it is capable of acting as speedily as the executive. Should the urgency or the need of secrecy be judged so great, however, as to preclude any form of consultation with Congress, the President, as we have noted, has unchallenged authority to respond to a sudden attack upon the United States. This authority is recognized as nothing less than a duty and it is inconceivable that the Congress would fail to support the President in response to a direct attack on the United States.

Finally, should the President find himself confronted with a situation of such complexity and ambiguity as to leave him without guideline for constitutional action, it would be far better for him to take the action he saw fit without attempting to justify it in advance and leave it to Congress or the courts to evaluate his action in retrospect. A single unconstitutional act, later explained or pronounced unconstitutional, is preferable to an act dressed up in some spurious, precedent-setting claim of legitimacy. As a member of the Nation's first Congress, Alexander White, of Virginia, said:

It would be better for the President to extend his powers on some extraordinary occasions, even where he is not strictly justified by the Constitution, than the legislature should grant an improper power to be exercised at all times * * *.⁴⁸

For all of the foregoing reasons the committee rejects the contention that the war powers as spelled out in the Constitution are obsolete and strongly recommended that the Congress reasserts its constitutional authority over the use of the Armed Forces. No constitutional amendment or legislative enactment is required for this purpose; all that is required is the restoration of constitutional procedures which have been permitted to atrophy.

Working through its traditional legislative processes, the Congress has the authority and the duty to reassert its constitutional authority to "declare war," "raise and support armies," "provide and maintain a navy," and "make rules for the government and regulation of the land and naval forces." If Congress makes clear that it intends to exercise these powers, it is most unlikely that the executive will fail to respect that intention. Napoleon is credited with the maxim that "the tools belong to the man that can use them." Only Congress, by exercising its constitutional powers, can prevent them from passing into other hands.

The committee does not believe that formal declarations of war are the only available means by which Congress can authorize the President to initiate limited or general hostilities. Joint resolutions such as those pertaining to Formosa, the Middle East, and the Gulf of Tonkin are a proper method of granting authority, provided that they are precise as to what is to be done and for what period of time, and provided that they do in fact *grant authority* and not merely express approval of undefined action to be taken by the President. That distinction is of the greatest importance. As used in the recent past, joint

⁴⁸ *The Annals of Congress*, June 18, 1789, vol. 1, p. 537.

resolutions have been instruments of political control over the Congress in the hand of the President, enabling him to claim support for any action he may choose to take and so phrased as to express congressional acquiescence in the constitutionally unsound contention that the President in his capacity as Commander in Chief has the authority to commit the country to war.

The committee therefore recommends that, in considering future resolutions involving the use or possible use of the Armed Forces, Congress—

(1) debate the proposed resolution at sufficient length to establish a legislative record showing the intent of Congress;

(2) use the words *authorize* or *empower* or such other language as will leave no doubt that Congress alone has the right to authorize the initiation of war and that, in granting the President authority to use the Armed Forces, Congress is granting him power that he would not otherwise have;

(3) state in the resolution as explicitly as possible under the circumstances the kind of military action that is being authorized and the place and purpose of its use; and

(4) put a time limit on the resolution, thereby assuring Congress the opportunity to review its decision and extend or terminate the President's authority to use military force.

Over the nearly two centuries of our constitutional history power over various aspects of our national life has shifted between the executive and the legislature depending on which, at a particular time, seemed to have greater energy or competence for performing the function in question. Within limits this flexibility is desirable; it has been one important factor in the survival and adaptability of our Constitution. When, however, as in the case of the war power, a shift takes place which is so great as to transfer authority from one branch of government to the other, and in so doing to negate the intent of the Constitution, there arises a threat to democracy and constitutional government. Whether the war power is misused or not by a particular President is not the fundamental point; the danger to constitutional government arises from the fact that the President or some future President will be in a *position* to misuse power.

The committee is well aware—and has expressed its awareness several times in these pages—that one of the reasons for the flow of the war power out of the hands of Congress and into the hands of the President has been the failure of Congress to adapt its power over the armed forces to the circumstances of the nuclear age. Tacitly acknowledging a lack of confidence in its ability to make that adaptation, Congress has permitted its war power to be transferred to the hands of an executive which, though less susceptible to self-doubt than the Congress, is no less susceptible to error.

Already possessing vast powers over our country's foreign relations, the executive, by acquiring the authority to commit the country to war, now exercises something approaching absolute power over the life or death of every living American—to say nothing of millions of other people all over the world. There is no human being or group of human beings alive wise and competent enough to be entrusted with such vast power. Plenary powers in the hands of any man or group threaten all other men with tyranny or disaster. Recognizing

the impossibility of assuring the wise exercise of power by any one man or institution, the American Constitution divided that power among many men and several institutions and, in so doing limited the ability of any one to impose tyranny or disaster on the country. The concentration in the hands of the President of virtually unlimited authority over matters of war and peace has all but removed the limits to executive power in the most important single area of our national life. Until they are restored the American people will be threatened with tyranny or disaster.

MINORITY VIEWS OF SENATOR GALE McGEE ON THE NATIONAL COMMITMENTS RESOLUTION*

Senate Resolution 85 is an ill-advised way in which to seek to achieve some sort of balance in foreign policy matters between the executive and legislative branches. It could even jeopardize the fixing of ultimate responsibility in foreign policy decisions.

The issue is not a new one, however. It is as old as the history of the American Republic. Its currency derives from the war in Vietnam, but its roots go back to the founding of our country.

In fact, the American ship of state was launched in 1776 upon waves of discontent with executive authority. The Thirteen Colonies, therefore, embarked upon their new course without a chief executive. Only after the near debacle of colonial independence was the need for strong, centralized control of the National Government openly recognized. Nowhere was the necessity for executive power more clearly in evidence than in the realm of foreign relations.

As a Member of Congress in 1799, John Marshall noted that "the President is the sole organ of the Nation in its external relations and its sole representative with foreign nations * * *"

Nonetheless, there was lodged in the hearts and souls of the leaders of the New Government an ingrained distrust of the powers of the President. This has continued down to the present day.

The issue of executive power in foreign policy has tended to rear its head during the administrations of strong Presidents and to languish through inattention during the administrations of weak Presidents. And without exception the trend toward a stronger and stronger executive role in foreign policy has coincided with the rising preeminence of the United States in world politics during the 20th century. Presidents Theodore Roosevelt, Taft, and Wilson expanded that role materially. But the most significant changes have occurred since the beginning of World War II. Under President Franklin Roosevelt the use of executive agreements experienced a sharp increase. In particular his commitments to the transfer of destroyers for bases, the extension of the Monroe Doctrine principle to Iceland and Greenland, and the "shoot on sight" edict to American naval forces in the Atlantic are often cited as serious encroachments by the Executive Office on the assumed foreign policy "partnership" between the President and the Congress.

Concomitant with the incidents preceding American involvement in World War II was the sudden emergence of the United States as the most powerful nation in the world, largely as a result of that conflict. As a great power, American actions cause reverberations all around the globe and must, therefore, be carefully weighed and delicately executed. Not infrequently they must be carried out swiftly.

*Report of the Foreign Relations Committee on S. Res. 85, Apr. 16, 1969, pp. 39-44.

The decisionmaking process may be reduced by events to a matter of a single day, or even hours. On more than one occasion the time allotted by crisis incidents to those who must make the decisions has been less than the time it would take to assemble a quorum of the Congress.

Possibly an even greater factor which presses for increasing the power of the President in making foreign policy in recent decades has been the advent of the nuclear age. We live in a time when 15 minutes could spell the difference between life and death for millions of people—possibly even for life itself on earth. In the past 25 years there have been times when the only sure thing that could be said about the next 24 hours was that no one really knew if we would live through them.

More than ever, consequently, the authority to make decisions and take action supporting them must be located in one place. From the rather meager beginnings of our constitutional system when Congress shared more directly with the President some of the policy processes, we have now come to an age when the pressure of time and the multiplicity of other issues scarcely allow the Congress more than a passing glance at some of the most important decisions in the history of mankind.

It is imperative, therefore, that in determining a judgment on Senate Resolution 85 we recast the role of the Congress—and more particularly of the Senate—in foreign affairs against the backdrop of the nuclear age. Whether the division of responsibility between the President and the Senate can follow the lines of other years is a question central to the present dispute. Whether Senate Resolution 85 goes to the heart of that dispute, moreover, is also open to serious doubts. The implications of its intent, furthermore, may raise more questions than its enactment could resolve.

It is the purpose of this minority report, therefore, to explain why Senate Resolution 85 should not be adopted by the Senate of the United States.

SENATE RESOLUTION 85 WOULD ONLY CONFUSE

The scope of the resolution is ambiguous and thus lends itself to misinterpretation and misunderstanding. It would seem to be impossible to pin down the substance of such an attempted codification. Confusion arises from the explanation of intent by the sponsors of the resolution. Its sponsors say specifically that Senate Resolution 85 would not be legally binding upon the President in the conduct of foreign relations. Also, it should go without saying that a sense-of-the-Senate resolution could not change the constitutional responsibilities of the President.

According to the proposed resolution, in creating a national commitment of the United States to a foreign power, such action must be affirmative by both the executive and the Congress. The resolution further specifies that this “affirmative” action would have to be taken “through means of a treaty, convention, or other legislative instrumentality specifically intended to give effect to such a commitment.” It is easy to understand how the sense of the Senate would be achieved without serious complications in such routine procedures as statutes, advice and consent to treaties, Senate resolutions, and joint

resolutions. This already takes place in an orderly and undisputed manner.

What happens, however, when the President proceeds in making commitments by Executive order which flow automatically from the authority contained in a prior treaty or in furtherance of a policy stated in an earlier joint resolution of the Congress? Do these subsequent steps likewise require additional affirmative action by the Senate? Like the ripples flowing outward from a falling pebble's impact on the water of a quiet pond, so it must be obvious this could become a farcical process when carried on into infinity.

SENATE RESOLUTION 85 THREATENS CONSTITUTIONAL POWERS OF THE PRESIDENT

It would appear to invade areas of responsibility reserved under the Constitution for the President alone. Two areas of executive responsibility will illustrate the point:

One, the President alone under the Constitution has authority to recognize foreign governments and to enter into commitments which implement that recognition. In the conduct of the foreign relations of the United States, the President necessarily must have the power to make many commitments to foreign governments.

Two, as Commander in Chief of the Armed Forces of the United States, the President has the sole responsibility over them either within our country or outside it. Reasonable men may well disagree as to the conditions under which he should do so. The President has the constitutional power to send U.S. military forces abroad when he deems it to be in the national interest.

Because Senate Resolution 85 implies that the President and the Congress together would be the exclusive means by which the Government of the United States in the future could enter into commitments with a foreign power, it runs counter to constitutional intent.

The sponsors of Senate Resolution 85 have gone to great pains to assure us that they have no intentions of tampering with the constitutional powers of the President. Yet, the majority report on Senate Resolution 85 is replete with references to and charges against a "constitutional imbalance" which, it is asserted, has resulted from power grabs by a succession of Chief Executives. Whatever the intent of the sponsors, the mere language of the resolution calls to the forefront current constitutional misgivings loaded with serious implications.

It is difficult to believe that the press, or students of constitutional principles for that matter, would permit Senate Resolution 85 to go by unnoticed. Or that friend, foe, and especially the Chief Executive would take such an ambitious thrust by means of a Senate resolution to mean so little as its sponsors almost apologetically claim to intend it to mean.

MISCHIEFMAKING AT BEST

At best, Senate Resolution 85 has only the capabilities of mischief-making with the responsibilities of the President of the United States in foreign affairs, particularly in times like the present. In a world of 130-odd sovereign nations, some of the more powerful of which are monolithic in structure and capable of quick decisionmaking, the

need for a President of the United States to act with dispatch has already arisen. It will surely recur again and again. Presidential decisionmaking in foreign policy provides a quality of leadership superior to the alternatives available under our system.

SENATE RESOLUTION 85 COULD DANGEROUSLY HOBBLE THE PRESIDENT

Does it strengthen the security of our country or serve the national interest to hobble the executive branch in times of crisis? The answer must be no. Mindful as we all are of the risk involved in increasing executive power in the field of foreign affairs, there would appear to be no reasonable alternative to assuming those risks save at the price of confusion, delay, and even inaction through some series of yet unspecified procedures implied in the commitments resolution.

Much as one may hesitate to repose such frightening authority in the executive branch alone, it is necessary to acknowledge that the alternative of joint dialog with the Congress in those particular circumstances would more likely obfuscate rather than clarify the issues. To have to revert to Senate debate and discussion at a time like that would be cumbersome at the very least and disastrous to the national interest in the extreme.

It serves to point up what has happened to the foreign policymaking process in a time of instant communications. The machinery of policy decisions assembled nearly two centuries ago simply has not been able to keep pace with the changing requirements of present-day realities.

SENATE RESOLUTION 85 SMACKS OF NEOISOLATIONISM

At a time when the world is getting smaller and when the problems among nations are becoming more complex, it ill behooves the leader of the free world to move away from its share of responsibility in coping with international crises. Yet, Senate Resolution 85 would have the effect of doing just that. Its point is not unrelated to the Ludlow amendment of the 1930's, which would have prevented a declaration of war by the Congress and President without first going to the people through a national referendum. As the Ludlow proposal would have diffused national responsibility in relation to the Congress, so the national commitments resolution would water down the responsibility which reposes with the President.

It is conceivable, should this resolution be enacted, that some President at some time would be required to plunge into a military crisis—say of the dimensions of Lebanon or Laos—in which he reached the conclusion that it was in the national interest to commit a limited number of troops in quick order. Such a decision in the wake of passage of Senate Resolution 85 would instantly become clouded with an aura of illegitimacy. The public doubts which would quickly surface in that circumstance could only impair the efforts of the President of the United States to act with dispatch and to conclude successfully the commitment. The implications of Senate Resolution 85 are heavily laden with overtones of neoisolationism.

If the democratic process is to be salvaged, we must be prepared to move toward more clean-cut presidential authority in foreign policy.

SENATE RESOLUTION 85 WRONG WAY TO STRENGTHEN THE ROLE OF
THE SENATE

Senate Resolution 85 is not the way to redress the balance of power in the making of foreign policy. Yet, its appealing intent is to try to do just that. It fails in that purpose by not binding the President and by flying in the face of the increasing need to repose the responsibility for critical decisionmaking in a place where it can be exercised quickly in time of crisis and with an opportunity to pin it down in fixing the responsibility for it. Neither of these latter two requirements could be met by simultaneous Senate affirmative action.

What would have been the complications had the above procedures been required at the time of the Lebanon crisis of 1958, or the Laotian crisis in 1962, both of which resulted in the landing of marines for a short but successful show of force?

Or for that matter, what would the sponsors of Senate Resolution 85 have had the Senate do differently in regard to the Tonkin Gulf resolution of August 1964? On that occasion that was Senate debate and a vote with only two nays. However that action may now be construed by some Vietnam critics in hindsight, it does nothing to enhance either the role of—or confidence in—the Senate to assert that the Members were “duped” by bad or insufficient intelligence.

In fact, Senate Resolution 85 could further weaken the Senate’s role in foreign policy. The mere fact of the resolution seems to be a case of “special pleading” in itself. What it implies is that, for whatever reasons, the Senate has dropped the ball; or, as the sponsors of the resolution would prefer, had it stolen from them. (Imagine the impact on the prestige of my pro-football team whose only excuse for losing the game was that the other team had stolen the ball.) The very intent of the resolution demeans the role of the Senate in foreign policy of begging for such a role.

What’s more, regardless of the intent of its sponsors, Senate Resolution 85 is already being interpreted from the outside as (a) an attack on the preceding administration for its policies in Vietnam, (b) a warning to this and future administrators in the same area, and (c) an apology for the unsuccessful efforts of the Senate in thwarting previous policy “mistakes.”

Whether these allegations are true or false is irrelevant. Their real point is that, without achieving its intent of redressing the balance of power in foreign policy, Senate Resolution 85 introduces mischievous elements, inspires misinterpretations, and demeans both the high office of the President of the United States and the responsible role of the U.S. Senate in foreign policy.

The reporting of Senate Resolution 85 at this time in itself casts some small shadow over the proceedings of the committee. The Foreign Relations Committee has only recently authorized an extensive subcommittee study of our national commitments (the ad hoc committee chaired by Senator Symington for U.S. Security Agreements and Commitments Abroad). At the outset of those studies it would be difficult to predetermine what the subcommittee will discover during its investigations. Would not the Foreign Relations Committee be acting in better grace to suspend a national commitments resolution until after the in-depth study is completed?

TO STRENGTHEN ITS ROLE THE SENATE NEEDS DEEDS NOT WORDS

Is there, then, a meaningful role for the U.S. Senate in the shaping of foreign policy? The answer, of course, is yes. If the Senate is to succeed in achieving this new role, it, too, must update its procedures in the foreign relations field as well as upgrade its sense of responsibility by focusing more and more on larger and larger questions. The Senate could afford to address itself well in advance of crises to the broad outlines and directions of American policy. This becomes far more constructive as well as influential than in responding principally to crisis situations after the fact.

The Senate's role in foreign policy of the future can best be achieved by deeds rather than by words—and least of all by the sense-of-the-Senate resolution.

The role of the Senate Foreign Relations Committee in the policy process is whatever it decides it to be. Thus, the committee can hide behind the shelter of a resolution, or it can stand on its deeds.

In fact, it would seem to be more important that the committee and the Senate involve itself with the decision elements implicit in an ABM system as the current International Organization and Disarmament Affairs Subcommittee has been undertaking (the Gore group); or the question of policy toward mainland China; or to reexamine our foreign policy assumptions and commitments in many of the critical areas of the world, as the Subcommittee for U.S. Security Agreements and Commitments Abroad (Symington group) is now doing.

In the final analysis, then, the Senate through the Foreign Relations Committee should preserve its role in national policymaking by deeds and actions rather than by lamenting its role in a sense-of-the-Senate resolution.

THE NATIONAL COMMITMENTS RESOLUTION ONE YEAR LATER

(Statement by J. W. Fulbright, June 1970)

Last year by a vote of 70 to 16, the Senate adopted the National Commitments Resolution expressing the sense of the Senate that "a national commitment by the United States results only from affirmative action taken by the Executive and Legislative Branches of the U.S. Government by means of a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment." By its action of April 1970 in initiating hostilities within the territory of Cambodia without the consent or even the prior knowledge of Congress or any of its committees, the Executive Branch has shown disregard not only for the National Commitments Resolution but for the constitutional principles in which that Resolution is rooted.

Even before the invasion of Cambodia the Nixon Administration had shown its disregard for the National Commitments Resolution. In its comments of March 12, 1970, on the original Mathias proposal calling for repeal of the Formosa, Cuba, Middle East and Tonkin Resolutions, the Department of State declined either to support or oppose repeal, asserting that "* * * the Administration is not depending on any of these resolutions as legal or constitutional authority for its present conduct of foreign relations, or its contingency plans." More specifically, as to the war in Indochina, the State Department asserted that "* * * this Administration has not relied on or referred to the Tonkin Gulf Resolution of August 10, 1964, as support for its Vietnam policy."

Since the Executive Branch explicitly disavows the Tonkin Resolution and the other resolutions as authorizations for its policy, a question remains as to where, in its view, the Executive does get its authority to conduct war. The apparent answer is that, despite the adoption of the National Commitments Resolution by an overwhelming vote of the Senate, the Administration still adheres to the position it took shortly after coming into office. In its comments of March 10, 1969, on the then pending National Commitments Resolution, the Department of State made the following assertion:

As Commander-in-Chief, the President has the sole authority to command our Armed Forces, whether they are within or outside the United States. And, although reasonable men may differ as to the circumstances in which he should do so, the President has the constitutional power to send U.S. military forces abroad without specific Congressional approval.

On the basis both of its statements and its actions, it seems evident that the present Administration, like a number of its predecessors, is basing its claim to war powers on either a greatly inflated concept of the President's authority as Commander-in-Chief, or on some vague

doctrine of inherent powers of the Presidency, or both. Another possibility is that the matter simply has not been given much thought.

The Executive is conducting a constitutionally unauthorized, Presidential war in Indochina. The commitment without the consent or knowledge of Congress of American soldiers to fight in Cambodia—a country which has formally renounced the offer of protection extended to it as a protocol state under the SEATO Treaty, and to which, therefore, we are under no binding obligation whatever—evidences a conviction by the Executive that it is at liberty to ignore the National Commitments Resolution and to take over both the war and treaty powers of the Congress when Congressional authority in these areas becomes inconvenient. It is noteworthy that Secretary Rogers met with the Foreign Relations Committee in closed session on April 27, three days before the invasion of Cambodia was announced, ostensibly to “consult” the Committee on policy with respect to Cambodia, but failed to give the Committee any indication of the pending military operation, much less to seek the Committee’s advice. It is also noteworthy that, in his address to the nation of April 30 explaining his decision to send American troops into Cambodia, the President did not think it necessary to explain what he believed to be the legal ground on which he was acting, other than to refer to his powers as Commander-in-Chief of the Armed Forces.

The fact that this attitude distinguishes the present Administration in no important way from several of its predecessors makes the matter even more disturbing. It is clear now beyond doubt that the National Commitments Resolution has had no effect on the Executive’s attitude or behavior and that hereafter, in order to discharge its responsibilities in the field of foreign policy, the Congress shall have to resort to measures more binding than a sense-of-the-Senate resolution.

CONGRESS, THE PRESIDENT, AND THE POWER TO COMMIT FORCES TO COMBAT*

Over a very long period in our history, practice and precedent have confirmed the constitutional authority to engage United States forces in hostilities without a declaration of war.

—Department of State, Memorandum.¹

It is . . . imperative that Congress guard zealously against any executive usurpation of its exclusive power to declare, or to decline to declare war.

—Lawyers Committee on American Policy
Toward Vietnam, Memorandum.²

The question of the legality of the Vietnam conflict has two distinct aspects: the justifiability of United States intervention under international law, and the constitutionality of such action under domestic law. The first has been the subject of considerable debate;³ the second has received less attention. Where it has not been dismissed as academic⁴ the issue has usually been approached polemically. One side vigorously asserts the constitutional authority of the President to act as Commander in Chief of the armed forces, while the other side with equal vigor brandishes that provision of the Constitution which gives Congress the power to declare war. The two sides assert claims which have support in constitutional history and are not incompatible but which bypass the real issue: how is the President's authority as Chief Executive and Commander in Chief to be reconciled with Congress' power to declare war? Thus phrased, the question calls for an analysis of the proper constitutional allocation between the President and Congress of the power to control the use of force in foreign affairs.⁵

I. SOURCES OF THE POWER: THE TEXTUAL AUTHORITY

A. *The Power of Congress to Declare War*

1. *The Original Understanding.*—Article I, section 8 confers on

*From the *Harvard Law Review*, volume 81, no. 8, June 1968, pp. 1771–1805.

¹ U.S. Dep't of State, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 Dep't of State Bull. 474, 488 (1966), reprinted in *Symposium—Legality of United States Participation in the Viet Nam Conflict*, 75 Yale L.J. 1084, 1085 (1966) [hereinafter cited as *Memorandum*].

² Lawyers Comm. on American Policy Toward Vietnam, *American Policy Vis-a-Vis Vietnam, Memorandum of Law*, in 112 Cong. Rec. 2666, 2672 (1966).

³ See, e.g., *Symposium—Legality of United States Participation in the Viet Nam Conflict*, 75 Yale L.J. 1084 (1966); Partan, *Legal Aspects of the Vietnam Conflict*, 46 B.U.L. Rev. 281 (1966); Comment, *The United States in Vietnam: A Case Study in the Law of Intervention*, 50 Calif. L. Rev. 515 (1962).

⁴ See Wright, *Legal Aspects of the Viet-Nam Situation*, 60 Am. J. Int'l L. 750, 768 (1965) ("[t]he issue seems unimportant in view of the broad Constitutional powers of the President to use armed force without Congressional support or declaration of war"). Compare Moore, *International Law and the United States Role in Viet Nam: A Reply*, 76 Yale L.J. 1051, 1091–93 (1967), with Falk, *International Law and the United States Role in the Viet Nam War*, 75 Yale L.J. 1122, 1154, (1966).

⁵ The recent hearings before the Senate Foreign Relations Committee constitute the most thorough attempt to date to approach the issue in these terms. See *Hearings on S. Res. 151 Before the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess. (1967) [hereinafter cited as *Hearings on National Commitments*]; Senate Comm. on Foreign Relations, *National Commitments*, S. Rept. No. 797, 90th Cong., 1st Sess. (1967) [hereinafter cited as *National Commitments Report*]. The result of the hearings—Senate Resolution 187—is set out at note 140 *infra*. A recent and comprehensive survey of the presidential and congressional precedents in this area may be found in R. Russell, *The United States Congress and the Power To Use Military Force Abroad*, Apr. 15, 1967 (unpublished thesis in Fletcher School of Law and Diplomacy Library).

Congress a number of specific powers relating to the regulation and control of the armed forces; among these is the power "to declare War."⁶ Construed literally, the clause would give Congress no more than the purely formal power to issue a document called "a declaration of war." The function of such a document, it might be argued, would be to distinguish "war" in the constitutional sense from all other hostilities. Its issuance would effectuate certain legal results with potentially profound consequences. Treaties would be canceled; trading, contracts, and debts with the enemy would be suspended; vast emergency powers would be authorized domestically; and legal relations between neutral states and the belligerents would be altered.⁷ But though there may have been a time when these changes in legal status were uniquely the result of the issuance of a formal declaration, this is clearly no longer true today.⁸ Countries have long engaged in undeclared hostilities which in terms of the effort involved, the impact on citizens, and the effect on domestic and international legal relations are often indistinguishable from a formally declared war.⁹ Both in American courts¹⁰ and in international contexts¹¹ rules of law which become effective on a finding that "war" exists do not depend critically on ascertaining that certain formal steps have been taken.¹² The only function which uniquely remains for the formal declaration of war is largely that of a solemn act of state which serves as a means of arousing popular support at home and abroad and which is usually reserved for extreme cases. In fact, the formal declaration of war in the modern context is often deliberately avoided precisely because of the apparent commitment to total victory and the general hardening of attitudes likely to result.¹³ Hence, a literal interpretation of the clause would give Congress a minimal role under modern conditions: the President would be able to "make" what in virtually all respects amounts to "war"; he just could not "declare" it.

That the war-declaring clause is not confined to such a narrow interpretation is made clear from the history of the clause in the Constitutional Convention. An earlier draft by the Committee of Detail gave Congress power to "make" rather than "declare" war. In direct contrast to the power of the British sovereign to initiate war on his own prerogative, the clause was the result of a deliberate decision by the framers to vest the power to embark on war in the body most broadly representative of the people.¹⁴ The clause remained in its original

⁶ U.S. Const. art. I, § 8:

"The Congress shall have Power * * * [t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations; [t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; [t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a larger Term than two Years; [t]o provide and maintain a Navy; [t]o make Rules for the Government and Regulation of the land and naval Forces * * *."

⁷ See Prize Cases, 67 U.S. (2 Black) 635, 687 SS ('862) (dissenting opinion); J. Rogers, *World Policing and the Constitution* 27, 34-35 (1945).

⁸ See Eagleton, *The Form and Function of the Declaration of War*, 32 Am. J. Int'l L. 19, 20, 32-35 (1938).

⁹ See F. Grob, *The Relativity of War and Peace* 283-89 (1949).

¹⁰ See note 23 *infra*.

¹¹ F. Grob, *supra* note 9, *passim*.

¹² See U.S. Dep't. of State, *The Question of a Formal Declaration of War in Vietnam*, in Senate Comm. on Foreign Relations, 90th Cong., 1st Sess., Background Information Relating to Southeast Asia and Vietnam 175-77 (Comm. Print 3d rev. ed. 1967).

¹³ See *id.* at 175; Falk, *supra* note 4, at 1154.

¹⁴ C. Berdahl, *War Powers of the Executive in the United States* 79 (1921): The Federalist No. 69 (A. Hamilton). Later comments by Hamilton indicate that in his view the power to embark on war was ordinarily an executive function which in the case of the United States was deliberately given to the legislature. See 7 Works of Alexander Hamilton 81 (J. Hamilton ed. 1851). There is considerable evidence from the history of the colonial period and experience under the Articles of Confederation, however, that this power, in America at least, was generally considered an inherently legislative function. See R. Russell, *supra* note 5, at 22, 27; cf. J. Rogers, *supra* note 7, at 29-31.

form in the committee drafts several weeks after other foreign relations powers had been transferred from the whole Congress to the Senate and then to the President.¹⁵ When the proposal to substitute "declare" for "make" was introduced, the debates over the issue indicate that the new wording was not intended to shift from the legislature to the Executive this general power to engage the country in war. At most, the sole reason for the substitution was to confirm the Executive's power "to repel sudden attacks."¹⁶ In all other cases the commitment of the country to a trial of force with another nation was to remain the prerogative of Congress.¹⁷ Both the purpose and intent of article I, section 8 are thus more accurately conveyed by construing that clause to give Congress not simply the power formally to "declare," but also the power generally to "initiate" war.¹⁸

2. *The Meaning of "War."*—If article I, section 8 is interpreted to mean that there shall be no war—declared or otherwise—unless Congress takes the initiative, the problem of defining "war" and "initiation" of war must be faced. From the beginning it has been recognized that not every involvement of the armed forces can be a "war" requiring congressional action.¹⁹ In the modern context where international conflict has so many forms, the problem is even more difficult. Despite occasional judicial attempts to discover a unique, general legal definition applicable in all contexts,²⁰ it seems clear that no verbal formula can identify one class of armed hostilities as properly subject to rules and considerations wholly different from those applicable to other classes.²¹ At best "war" will assume different means depending on the context which prompts the investigation,²² whether it be the interpretation of a contract, a life insurance policy, a statute, or a con-

¹⁵ See J. Rogers, *supra* note 7, at 28.

¹⁶ This is the reason advanced by Madison during the debate over the proposed change. An earlier vote had resulted in a defeat of the motion to change the language from "make" to "declare." At least one delegate, Mr. Ellsworth, changed his vote when it was pointed out that "make war" might be construed to give Congress power to "conduct war" after it had begun—a function clearly meant to be given to the Executive. See 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 313, 318–19 (rev. ed. 1937). Since it is impossible to tell what reasons actually motivated those who voted for the change, it is not completely accurate to conclude that the Executive was to have even the power to "repel sudden attacks." At any rate Mr. Ellsworth's remarks make untenable any suggestion that the change in wording was designed to alter any substantial degree Congress' power to "make" war. Other views expressed during the debates are recorded by Madison as follows. Mr. Pinckney objected to the original version, arguing that the House of Representatives was too numerous and, hence, too slow to be vested with the sole power to make war. He agreed with Hamilton that the Senate would be a better repository for this power. Mr. Butler felt the same objections were applicable to the Senate and the power should be given to the President, who would not make war except when the nation would support it. To this Mr. Sherman objected that the Executive "should be able to repel and not commence war," and Mr. Gerry expressed the view that he "never expected to hear in a republic a motion to empower the Executive alone to declare war." He supported Madison's motion to insert "declare," striking out "make" and leaving to the Executive "the power to repel sudden attacks." *Id.* at 318–19.

¹⁷ What little is added to the Convention debates by the debates over ratification indicates that the most that was left to the President was the power to defend against imminent invasion when Congress was not in session. See R. Russell, *supra* note 5, at 63.

¹⁸ See *Hearings on National Commitments* 9–10; cf. Corwin, *The President's Power*, New Republic, Jan. 29, 1951, at 15.

¹⁹ Cf. J. Rogers, *supra* note 7, at 21.

²⁰ Compare Prize Cases, 67 U.S. (2 Black) 635, 666 (1863) ("[w]ar has been well defined to be, 'That state in which a nation prosecutes its right by force'"), with *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40 (1800) (separate opinion) ("[i]t may . . . be safely laid down, that every contention by force between two nations, in external matters, under the authority of their respective governments, is * * * war").

²¹ See Osgood, *War and Policy*, in *American Defense Policy* 109, 114 (1965).

²² Compare *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800) (hostilities with France from 1798 to 1800 constituted war within the meaning of a statute granting recovery of salvage value for private vessels recaptured from "the enemy"), with *Gray v. United States*, 21 Ct. Cl. 340 (1886) (same conflict was not a war for purposes of a 1778 treaty with France whose terms were to remain in force only while France was "at peace" with the United States).

stitution.²³ Accordingly, the meaning of "war" in the context of the constitutional allocation of power to use force in foreign relations must be determined with reference to the purpose of the war-declaring clause: to safeguard the United States against unchecked executive decisions to commit the country to a trial of force.

There are two possible reasons for requiring such a safeguard from the body most directly representative of popular sentiment. The first is that such a decision involves a risk of great economic and physical sacrifice not to be incurred without such approval. The second is that even in cases where no significant physical effort is likely to be required—as, for example, in a conflict with a weak nation unsupported by allies—the very act of using force against a foreign sovereign entails moral and legal consequences sufficiently significant to require an expression of popular approval.²⁴ These two rationales provide at least a starting point for formulating a definition of "war" which will give operational content to article I, section 8. The first argues for a definition phrased in quantitative terms, which would require congressional action prior to engaging in "major" hostilities above a certain level of intensity. The second would result in a more comprehensive, qualitative definition which would forbid any use of force against a foreign sovereign without prior congressional approval. Much of the early struggle between the President and Congress in this area can be read as an attempt to translate these admittedly vague conceptions into workable guidelines for determining the proper procedures for employing the military in foreign contexts.

B. The President as Commander in Chief and Chief Executive

Discussions of the President's power to control the armed forces invariably focus on the provision in article II that "[t]he President shall be Commander in Chief of the Army and Navy of the United States." As a source of power, however, this provision ought to play a rather meager role. From the first it has been interpreted as simply placing the President at the top of the pyramid of military command, making him, in Hamilton's words, "first general and admiral of the confederacy."²⁵ Since the clause contains nothing to indicate the purposes for which the President may exercise the power thus granted to command the troops, these purposes must ultimately be found in other provisions of article II. Sections 1 and 3, which vest the "executive power" in the President and require him to "take Care that the Laws be faithfully executed," have long been construed to give the President the power to enforce the laws and "the peace of the United

²³ The United States Court of Military Appeals in determining that the Korean conflict constituted a war within the meaning of that term as used in the Uniform Code of Military Justice gave the following reasons for its decision:

"We believe a finding that this is a time of war, within the meaning of the language of the Code, is compelled by the very nature of the present conflict; the manner in which it is carried on; the movement to, and the presence of large numbers of American men and women on, the battlefields of Korea; the casualties involved; the sacrifices required; the drafting of recruits to maintain the large number of persons in the military service; the national emergency legislation enacted and being enacted; the executive orders promulgated; and the tremendous sums being expended for the express purpose of keeping our Army, Navy, and Air Force in the Korean theatre of operations." *United States v. Baneroff*, 3 U.S.C.M.A. 3, 5, 11 C.M.R. 3, 5, (1953).

For a review of this and similar cases attempting to determine whether the Korean conflict was a war see Pye, *The Legal Status of the Korean Hostilities*, 45 Geo. L.J., 45 (1956). For an illustration of the difficulties of defining "war" even in the context of a life insurance policy compare the majority with the dissenting opinion in *New York Life Ins. Co. v. Bennion*, 158 F.2d 260 (10th Cir. 1946).

²⁴ Cf. J. Rogers, *supra* note 7, at 34-35.

²⁵ *The Federalist* No. 69, at 515-16 (J. Hamilton ed. 1864) (A. Hamilton). This view was endorsed a half century later in a Supreme Court opinion by Chief Justice Taney. See *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850).

States" by any means he finds necessary.²⁶ While there has been some dispute over the extent to which inherent or implied powers of his office allow the President to use force without prior statutory authorization in other areas—notably to aid civil authorities or to protect states from domestic violence²⁷—the authority of the President to use the armed forces, at least in the absence of restrictive legislation, in order to enforce within the United States substantial federal interests evidenced by the nation's laws is now generally accepted.²⁸

If the President's power to employ troops extended only to situations involving the maintenance of internal law and order, there would be little room for conflict between presidential power to commit troops to combat and congressional power to initiate war. Except where he was repelling "sudden attacks" the proper exercise of the President's powers should not result in direct conflict with a foreign nation.

While there is some evidence that, absent an attack, the framers never intended troops to be used outside the country without congressional consent,²⁹ a rapid expansion of presidential power to use force abroad soon took place. The expansion began with the advance of the view that the duties of the Chief Executive included the power to protect American property and lives abroad—a view which received judicial support in the mid-nineteenth century in an opinion by Mr. Justice Nelson.³⁰ The authority for the exercise of such power seems to have been traced at times to the inherent powers of the Chief Executive³¹ and at other times to the explicit duty to "take Care that the Laws be faithfully executed."³² Although occasional efforts were made to limit this presidential power to the protection of "rights" of person and property as distinguished from the enforcement of broader national "interests,"³³ the validity of such a distinction soon became questionable. Since international law as well as statutes and treaties had long been considered part of the "laws" to which the "faithfully executed" clause refers³⁴ any interest evidenced by those laws became a potential subject for presidential protection by force. Further, even where there was no formal legal basis for such action, the President often undertook to protect broad foreign policy interests of the United States under inherent powers of the Chief Executive over foreign affairs. By the end of the nineteenth century the capacity of the

²⁶ See *In re Neagle*, 135 U.S. 1, 63–64, 67, 69 (1890); *Ex parte Siebold*, 100 U.S. 371, 394–95 (1880) (dictum).

²⁷ See E. Corwin, *The President: Office and Powers* 130–39 (4th rev. ed 1957); Note, *Riot Control and the Use of Federal Troops*, 81 Harv. L. Rev. 638, 647–52 (1968).

²⁸ See *In re Debs*, 158 U.S. 564, 582 (1895) ("the entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care"); E. Corwin, *supra* note 27, at 134.

²⁹ Since neither a standing army nor a navy was originally thought necessary, any military venture abroad would inevitably have required congressional participation in authorizing the expedition by raising troops or calling up the militia. Even where troops were available, resort to Congress was sought prior to their use abroad during the nation's first twenty-five years under the Constitution. See R. Russell, *supra* note 5, at 59–60, 146; cf. National Commitments Report 9.

³⁰ *Durand v. Hollins*, 8 F. Cas. 111 (No. 4186) (C.C.S.D.N.Y. 1860). The case arose out of the bombardment of a Nicaraguan town because of the refusal of local authorities to pay reparations for an attack by a mob on the United States consul. (For a detailed account of the incident see 7 J. Moore, *A Digest of International Law* 346–54 (1906).) Suit was brought by a private person against the naval officer for the value of property destroyed. Mr. Justice Nelson, then on circuit from the Supreme Court, upheld the defense that the officer was following legitimate orders of the President of the United States, declaring that citizens abroad, no less than citizens at home, are entitled to look to the Executive as head of the nation for the protection of person and property.

³¹ *Id.*

³² See M. Offutt, *The Protection of Citizens Abroad by the Armed Forces of the United States* 5 (1928).

³³ See E. Corwin, *supra* note 27, at 198–201.

³⁴ See *In re Neagle*, 135 U.S. 1, 63 (1890); 1 Op. Att'y Gen. 566, 570–71 (1822).

Executive to protect apparently without distinction the great variety of such interests, whether evidenced by statutes, treaties, international law, or broad foreign policy aims, was well documented.³⁵

C. The Area of Conflict

If all of these interests are proper subjects for presidential protection, it is apparent that the exercise of presidential powers over the military may well lead to interference with the rights or interests of other nations and thus launch the United States into war without congressional assent. At this point the constitutional issue arises of the extent to which Congress' power to declare war limits this power of the President to employ the armed forces abroad. To some extent the problem is not peculiar to the question of the power to control the military. The conflict between the grants of power in articles I and II is but a specific example of the more general problem of determining where the Constitution lodges the power to determine United States foreign relations.³⁶ As early as 1793, the problem arose in connection with President Washington's issuance of a neutrality proclamation on the outbreak of war between France and Great Britain. In the ensuing debate carried on in the "Pacifcus-Helvidius" exchange between Hamilton and Madison, the latter argued that since the power over foreign affairs could effectively become the power to commit the country to a course which would lead to war, that power belongs to Congress by virtue of the war-declaring clause. Hamilton, on the other hand, argued that the power to determine foreign policy is essentially an implied or inherent function of the "executive power" although the implementation of such policies may depend on the subsequent exercise of concurrent or independent congressional powers.³⁷ By and large it is Hamilton's view which has prevailed. The President is recognized as possessing a wide variety of powers, the exercise of which does not constitute an infringement on congressional power to initiate war despite the possibility that his acts may provoke another country to resort to war.³⁸ But though the initiative in shaping foreign policy rests with the President, the power to implement that policy through the actual employment of the military theoretically still remains with Congress, wherever such employment would amount to making "war." As indicated by the debates, only in certain defensive situations where the President is responding to an attack is his power to use force without restriction—even to the point of waging war if necessary—compatible with the intent of article I, section 8. Hence, the struggle in this area with respect to the specific question of the power to control the use of the military can be viewed as centering on two major issues. The first is the problem of determining those "defensive" cases in which the President may wage war without congressional authorization. The second is essentially the problem discussed above of defining "war" in the sense of article I, section 8 as a limit on the President's power to use force to protect or advance American interests in all other situations.

³⁵ See J. Rogers, *supra* note 7, at 79–80.

³⁶ The powers conferred on the executive and legislative branches which bear on relations with other nations have been characterized as "an invitation to struggle for the privilege of directing American foreign policy." E. Corwin, *supra* note 27, at 171.

³⁷ See *id.* at 177–81.

³⁸ Examples include the power to dismiss foreign ambassadors, to break off diplomatic relations with other countries, and to extend recognition to political factions claiming to constitute the legitimate government of a foreign nation. See C. Berdahl, *supra* note 14, at 26–37; Q. WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 285 (1922).

The resolution of these problems has largely been left to historical practice. The courts have from the beginning shown a reluctance to enter this classic separation-of-powers debate³⁹ and, on the particular issue of the proper allocation of the power to embark on war, have been virtually silent.⁴⁰ What answer there is to the constitutional issue must come from the interpretations provided through history by the two concerned parties themselves—the President and Congress.

II. PRESIDENTIAL POWER TO ENGAGE IN WAR: THE THEORY OF SELF-DEFENSE

Though the war-declaring clause was intended to give Congress the power to initiate war in most cases, the debates suggest that at least in the case of a “sudden attack” the President was to be able to respond without prior congressional sanction, even though such response would amount to “making war.” The rationale for conceding the existence of this power in the President no doubt lies in the recognition that where the defense of the country itself is at stake, there is simply no room for procedural restrictions which might hamper the republic’s ability to survive intact. Thus viewed, the power need not rest on any specific provision of the Constitution; as a necessary concomitant of sovereignty itself, the inherent right of national self-defense gives the President full power to defend the country against sudden attack with whatever means are at his disposal as Commander in Chief.⁴¹

Left unresolved, however, are such questions as what constitutes a “sudden attack,” whether the attack must be directed against the United States, who is to determine when such an attack has occurred, and to what extent the President in repelling the attack must limit his actions solely to acts of defense.

A. *The Historical Development*

Precedents for the President’s defensive powers were established under the country’s first administration. In the course of American campaigns against the Indians in 1794 the Indians elected at one point to take a stand at a British fort located twenty miles within American territory. While technically an act of invasion, it was not clear that establishment of the fort by the British was in any way intended as an act of aggression against American territory. Though anxious to avoid a new conflict with the English which might arise if they supported the Indians against an American attack, President Washington nevertheless dispatched instructions to the American commander which left no doubt of his confidence that he possessed the power to begin such a conflict if necessary.⁴² Fortunately, collision with the garrison proved unnecessary.⁴³

³⁹ Cf. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 309 (1829) (Marshall, C. P.) (“[a] question like this * * * is * * * more a political than a legal question”).

⁴⁰ See J. Rogers, *supra* note 7, at 38. In recent attempts to bring precisely this issue—the constitutionality of the President’s action in Vietnam—before the courts, the cases have been dismissed as involving political questions in an uncontested suit against the government. See *Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir.) *cert. denied*, 387 U.S. 945 (1967); *Mitchell v. United States*, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967).

⁴¹ See C. Berdahl, *supra* note 14, at 58–62; cf. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 309, 316–18 (1936).

⁴² The instructions, issued without consulting Congress, read: “If, * * * in the course of your operations against the Indian enemy, it should become necessary to dislodge the party at the rapids of the Miami, you are hereby authorized, in the name of the President of the United States, to do it.” Instructions from General Knox, Sec’y of War, to General Wayne, in C. Fish, *American Diplomacy* 83–84 (1915).

⁴³ The account is from C. Berdahl, *supra* note 14, at 62–63.

The question of the scope of the President's power to respond to a foreign declaration of war arose early in Jefferson's first administration. When the Bey of Tripoli threatened to declare war on the United States Jefferson dispatched a squadron of frigates to the Mediterranean to protect American commerce there against attack in the event the threat were carried out. Before the squadron could arrive, war was declared "by the established custom of chopping down the flagpole of the consulate."⁴⁴ Doubtful of the extent of his power to act without congressional approval, Jefferson instructed his commander to release any prisoners taken and to release any vessels captured after having disarmed them. In the President's view his authority to act in defense of the country did not extend to taking further aggressive action, even against a declared adversary, in the absence of congressional authorization.⁴⁵ This conservative interpretation of the scope of the President's defensive powers was bitterly attacked by Hamilton. In his view once the country is attacked or war is declared by a foreign nation, the President has full power to respond with whatever force he deems fit. As long as the United States is not the initial aggressor, the President's actions will remain "defensive" requiring no further congressional action to enable him to continue to wage the war thrust on the country.⁴⁶

Hamilton's view received support in the Mexican War a half century later. President Polk instructed General Taylor to occupy disputed territory and to treat any crossing of the Rio Grande⁴⁷ as an invasion authorizing him to attack first in defense and even enter Mexican territory in pursuit of the invaders.⁴⁸ The instructions were carried out, two skirmishes were fought, and hostilities finally erupted in April, 1846. Although he immediately asked for congressional approval of his actions, the President sought to justify his recourse to arms without first securing such approval by the claim that he was defending the United States against attack. At the conclusion of a bitter debate over the factual basis for Polk's assertions that "war exists by act of Mexico," and that his response was a "defensive" one,⁴⁹ Congress finally accepted the President's claims and authorized further hostilities.⁵⁰

The final stamp of approval on this expanding power of the President to make war without prior authorization under the theory of

⁴⁴ S. Bemis, *A Diplomatic History of the United States* 176 (4th ed. 1955).

⁴⁵ In a message to Congress on December 4, 1801, Jefferson explained his actions:

"Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that, in the exercise of this important function confided by the Constitution to the Legislature exclusively, their judgment may form itself on a knowledge and consideration of every circumstance of weight." 11 *Annals of Cong.* 12 (1801).

⁴⁶ 7 *Works of Alexander Hamilton* 746-47 (J. Hamilton ed. 1851) (emphasis in original):

"[I]t is the peculiar and exclusive province of Congress, *when the nation is at peace* to change that state into a state of war; whether from calculations of policy, or from provocations, or injuries received; in other words, it belongs to Congress only, *to go to War*. But when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact *already at war*, and any declaration on the part of Congress is nugatory; it is at least unnecessary."

⁴⁷ The Rio Grande was the boundary claimed by the independent Republic of Texas since 1836 and subsequently by the United States on the annexation of Texas in 1845. See generally S. Bemis, *supra* note 44, at 232-38.

⁴⁸ See *id.* at 239; C. Berdahl, *supra* note 14, at 70-71.

⁴⁹ Message to Congress, May 11, 1846, in *Cong. Globe*, 29th Cong., 1st Sess. 783 (1846).

⁵⁰ Act of May 13, 1846, ch. 16, 9 Stat. 9. Two years later, in passing a resolution of thanks to General Taylor the House tacked on an amendment reading "that the war was unnecessarily and unconstitutionally begun by the President of the United States." A subsequent motion of expunge this amendment from the journal was tabled. See *CONG. GLOBE*, 30th Cong., 1st Sess. 95, 343-44 (1848).

defense was given during the Civil War. In the *Prize Cases*⁵¹ the Supreme Court upheld the validity of Lincoln's proclamation of a blockade of the Southern ports. The President was recognized as possessing unlimited power to wage war in defending against a war begun through invasion or rebellion; in addition, he was to be the sole judge of when such invasion or rebellion amounted to "war," thereby authorizing assumption of his full defensive powers.⁵² Although four Justices, including Chief Justice Taney, vigorously opposed this result⁵³ the decision remains uncontroverted today.⁵⁴

This expanding power of the President to engage in "defensive wars" is, however, not without inherent limits. The basis of the theory in the *Prize Cases* is essentially Hamilton's: when another nation has "openly or avowedly" made war upon the United States⁵⁵ the President in responding is not himself "initiating" war but is merely accepting the challenge thrust on the country by the foreign attack.⁵⁶ Hence, in each case the determination must be made whether the hostile acts committed against the United States constitute "war," enabling assumption of his defensive war-making powers. In making this determination, definitional problems similar to those discussed above with respect to "initiating" war⁵⁷ must be faced. Hamilton's views notwithstanding, a declaration of war against the United States need not automatically place the country at war. Thus, when Bulgaria, Hungary, and Rumania declared war on the United States on December 13, 1941, President Roosevelt ignored the declarations. Only later, as a gesture of friendship to the Soviet Union, did he ask Congress to recognize that the United States was at war with those countries.⁵⁸ Such empty declarations still leave open the decision whether to turn the "paper war" into an actual war⁵⁹ and, hence, theoretically remain candidates for congressional, rather than presidential war making.

Similarly, not every use of force against the United States is an act which places the country at war, justifying presidential defensive war making. Almost any attack on or invasion of the United States proper would probably qualify as such an act, as would a similar act aimed at United States territorial possessions.⁶⁰ Polk's actions set a precedent for also viewing as "war" the invasion of disputed territory claimed under a treaty of annexation. Less likely candidates are cases of attacks on United States ships or personnel stationed abroad. The response to an attack on the *Pueblo*, for example, could hardly be characterized as

⁵¹ 67 U.S. (2 Black) 635 (1863).

⁵² The Court stated:

"If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority * * *."

"* * * The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name. * * *"

"Whether the President * * * has met with such armed hostile resistance * * * as will compel him to accord to them the character of belligerents, is a question to be decided by him * * *." *Id.* at 668-70 (emphasis in original).

Technically, the Court's statements constitute an alternative holding since the blockade was also recognized as retroactively sanctioned by Congress. *See id.* at 670-71.

⁵³ While recognizing the President's authority to use force to meet the rebellion under existing laws, the dissent would have denied effect, absent a formal declaration of war by Congress, to rules of law on blockade in time of war.

⁵⁴ *See Mora v. McNamara*, 389 U.S. 934, 937 (1967) (Douglas, J., dissenting), *denying cert. to No. 20,420* (D.C. Cir., Feb. 20, 1967).

⁵⁵ *See note 46 supra.*

⁵⁶ *See note 52 supra.*

⁵⁷ *See pp. 774-75 supra.*

⁵⁸ Message to Congress, June 2, 1942, in 88 Cong. Rec. 4787 (1942); *see F. Grob, supra note 9*, at 290.

⁵⁹ *See generally F. Grob, supra note 9*, at 289-302.

⁶⁰ Though also accompanied by a declaration of war, the bombing of Pearl Harbor was recognized by Congress the following day in its declaration of war as having "thrust" war on the United States. Act of Dec. 8, 1941, ch. 561, 55 Stat. 795.

"defending the country" in a war thrust on the United States by act of North Korea; rather, the response in such a situation is more accurately a case protecting American rights and interests abroad.⁶¹

It is the lesson of the *Prize Cases* that in all of these situations this determination—whether an attack against the United States has occurred which "thrusts war" on the country for purposes of presidential, defensive war making—is exclusively the President's. The rationale of the decision, however, does not extend to anything short of such an attack.

B. The Modern Context: Collective Self-Defense

The historical development of the self-defense rationale would limit independent presidential power to engage in war to certain cases involving direct attacks against the United States. The recent State Department memorandum suggests, however, that a "direct attack" is no longer a realistic prerequisite for exercise of the President's power to act unilaterally in national self-defense: in view of the delicate balance of power among nations as well as the frightening technology of modern warfare, an attack on a foreign country may just as surely threaten our security as a direct attack on United States territory.⁶²

The notion that the United States possesses extraterritorial security interests is hardly novel. As early as 1811, in a resolution declaring that the Government would not view with indifference the transfer of Florida to any other power, the idea of "defining a security zone" of the United States was introduced into American foreign policy.⁶³ By the end of the nineteenth century, with the development of the Monroe Doctrine, the entire Caribbean area had come to be regarded as just such a zone.⁶⁴

It was left, however, to the twentieth century and the experience of two world wars to give full birth to the idea of linking American defense with extraterritorial security interests. National security became world security, and there emerged the thesis of collective self-defense: war was an evil which the peaceful nations of the world must guard against by developing common means of halting an outbreak of aggression. The United Nations Charter explicitly recognized "the inherent right of individual or collective self-defense,"⁶⁵ and the United States proceeded accordingly in the years following World War II to conclude a number of regional and bilateral security agreements. By these the United States generally agreed to regard an attack on a member nation as threatening its own safety and to assist in defensive measures.⁶⁶

⁶¹ See generally pp. 1787-94 *infra*.

⁶² See Memorandum, *supra* note 1, at 484.

⁶³ See D. Perkins, *The American Approach to Foreign Policy* 108 (rev. ed. 1962).

⁶⁴ See *id.* at 108-09. For a brief history of the development of this "security thesis" see *id.* at 107-15.

⁶⁵ U.N. Charter art. 51.

⁶⁶ See, e.g., Southeast Asia Collective Defense Treaty, Sept. 8, 1954, art. IV, para. 1, [1955] 1 U.S.T. 81, T.I.A.S. No. 3170 ("[e]ach Party recognizes that aggression by means of armed attack * * * against any of the Parties * * * would endanger its own peace and safety"); North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2242 (1949), T.I.A.S. No. 1964 ("an armed attack against one or more of [the Parties] shall be considered an attack against them all"); Charter of the Organization of American States, Apr. 30, 1948, ch. V, art. 24, [1951] 2 U.S.H. 2394, T.I.A.S. No. 2361 ("[e]very act of aggression by a State against * * * an American State shall be considered an act of aggression against the other American States"); Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 3, para. 1, 62 Stat. 1681 (1948), T.I.A.S. No. 1838 ("an armed attack by any State against an American State shall be considered as an attack against all the American States").

For an exhaustive listing of similar American commitments evidenced by treaty, by less formal arrangements, and by official unilateral declaration see U.S. Dep't of State, *United States Defense Commitments and Assurances*, August, 1967, in *Hearings on National Commitments* 52-71.

There are a number of difficulties with the theory that, for purposes of presidential war-making power, an attack on another country—even if under circumstances specified by a mutual defense treaty—is equivalent to an attack on the United States. Presumably, any resort to war—even where authorized by Congress—is justified only because in some sense United States security is thought to be at stake. Hence, the fact that “security interests” are involved does not in itself alter the normal processes for deciding whether such interests are worth defending at the price of war. That decision, where a foreign state is attacked, will depend on a variety of factors—proximity to the United States; the value of the country as an ally; other United States interests involved, such as military bases and military sites; and the nature of the aggression and the aggressor.⁶⁷ In each case difficult political and military decisions must be made which may well lead reasonable men to different conclusions in determining whether the interest involved is necessary to the defense of the United States. Where, on the other hand, the attack is against the United States itself, there can be no question presumably that the “security interest” involved warrants defending at the cost of war if necessary; to require the President to await what amounts to an obvious, foregone conclusion on the part of Congress is at best a needless formality, and at worst may occasion dangerous delay.

Yet, even if it be granted that not every eruption of violence abroad poses a threat so inimical to our own security that the defense of the United States itself is immediately involved, still, there may be some cases where such a threat is posed. For example, an invasion of Canada by communist forces—even if clearly aimed solely at that country—may be thought to represent a threat to our continued existence which is indistinguishable from that posed by a similar invasion of Alaska. Again, though, Hamilton’s arguments point to a fundamental, albeit somewhat conceptual, difference between the two cases which suggests that in the case of Canada, though not in the case of Alaska, the President must seek congressional authorization to defend against the attack where time permits. The debates suggest that one of the prerequisites for unilateral presidential response even in defense of the country is that the attack be so “sudden” that resort to Congress is militarily precluded.⁶⁸ Although this requirement was apparently dispensed with in the case of a direct attack,⁶⁹ the reasons which justify dropping the requirement do not extend to the case of an attack on a foreign state. In the event of an armed attack on United States territory itself, Congress’ decision whether or not to go to war is not simply bypassed as obvious; it is recognized as being completely superfluous: the President is simply assuming his wartime role as Commander in Chief in a situa-

⁶⁷ Cf. Wolfers, “National Security” as an Ambiguous Symbol, in American Defense Policy 1, 4, 6 (1965). The State Department in fact insists on interpreting current defense commitments so that after an attack on another nation has occurred, it still remains to the United States to determine “in light of future facts” exactly “what is necessary.” Statement by N. Katzenbach, Under Sec’y of State, in *Hearings on National Commitments* 71, 97.

⁶⁸ See p. 1773 and notes 16, 17 *supra*.

⁶⁹ In the examples discussed above, Jefferson, Polk and Lincoln each had time to seek congressional approval before the action taken. Though action was taken unilaterally, each sought and received congressional authorization concurrently with or immediately after the steps taken. See Act of August 6, 1861, ch. 63, § 3, 12 Stat. 326 (confirming all acts, proclamations, and orders of the President, after the 4th of March, 1861); Act of July 13, 1861, ch. 3, 12 Stat. 255 (authorizing a variety of emergency measures, including in § 4 the capture and condemnation of vessels attempting to enter certain ports); Act of May 13, 1846, ch. 16, 9 Stat. (authorizing Polk’s actions against Mexico); Act of Feb. 6, 1802, ch. 4, 2 Stat. 129 (authorizing Jefferson to carry on hostilities against the Barbary Powers).

tion in which the decision to resort to war has been taken out of the country's hands by the unilateral action of another state.⁷⁰ In the case of an attack aimed solely at Canada, on the other hand, the decision whether the United States will become involved in the conflict is still open. As long as this is the case, steps taken to repel the attack would amount, from the United States point of view, to "commencing" rather than "repelling" war: the type of decision the convention debates indicate was to be made by Congress.

To say that the President must seek congressional approval before going to war where "security interests" are threatened does not mean that the President's ability to defend the country will be unreasonably restricted. Especially in the context of nuclear warfare, the understanding of what constitutes an attack has been vastly altered; retaliatory action need not lose its defensive character merely because no physical blow has actually reached the nation's shores. But the fear of nuclear war which haunted the fifties helped give rise to a sense of need for prompt executive action which is often exaggerated in the context of current crises and the reemergence of more conventional warfare.⁷¹ In these cases the constitutional interest in allowing Congress to decide what is worth the price of war should be accommodated as much as possible. While the President must still be left with the power to judge in the first instance whether a given event constitutes an imminent threat to our survival and demands a response which leaves no time to seek Congress' assuagement in that judgment, such limited discretion falls far short of authorizing assumption of his defensive war-making powers whenever the interest jeopardized is labeled a "vital security interest." None of the recent examples of overseas conflict presents a convincing case for the President's use of force under the theory of self-defense. Neither the invasion of South Korea during President Truman's administration, the Arab threat to Lebanon during Eisenhower's, the sending of missiles to Cuba during Kennedy's, nor the disorder in the Dominican Republic during the current administration constituted a threat requiring an immediate response in order to defend the territorial sovereignty of the United States. With the possible exception, discussed in the following section, of the attacks on United States destroyers in the area this is also true of the current conflict in Vietnam.

C. Preparing for Defense: Some Unexamined Assumptions About the Power of the Commander in Chief

Although the commander-in-chief clause places the President at the head of the armed forces, it says nothing about the purposes for which or circumstances under which the military may be used.⁷² Even the President's power to defend against attack stems primarily from the power inherent in the sovereign status of the United States under the Constitution to defend itself with its armed forces without first completing formal authorizing procedures; only in a derivative sense does this power devolve on the Commander in Chief as head of those forces. Accordingly, although a long line of precedent beginning with Lincoln's actions in the Civil War transformed the clause into "a vast reservoir of indeterminate powers in time of emergency,"⁷³ such

⁷⁰ See p. 1781 and note 46 *supra*.

⁷¹ See National Commitments Report 6.

⁷² See p. 1775 *supra*.

⁷³ E. CORWIN, *supra* note 27, at 261.

emergency powers were generally confined to the necessities of dealing with domestic problems in time of actual war.⁷⁴ However, a widespread practice has developed of citing the commander-in-chief clause as independent authority for doing apparently "anything, anywhere that can be done with an army or navy."⁷⁵ Such claims are clearly too broad. Yet even if the power to command and deploy the troops is restricted to actions which are necessary steps in preparing to defend the country,⁷⁶ considerable room is left for conflict with Congress' power to declare war. It will be possible to deploy troops in situations where, though combat is technically not involved, either the danger of provoking conflict is evident, or the deployment of troops itself is difficult to distinguish from a commitment of forces offensively against a foreign country.

Examples are provided by presidential actions prior to American entry into World War I and World II. After the defeat through a Senate filibuster of a bill which would have given congressional approval to President Wilson's proposal for arming United States merchant ships in 1917, Wilson proceeded under "the plain implications of my constitutional duties and powers"⁷⁷ to order the arming of such vessels with instructions to fire on sight at submarines. The action was justified as a necessary measure of defense against the dangers to neutral United States shipping inherent in submarine warfare; yet, as Wilson himself later acknowledged, the action was "practically certain" to draw us into the war.⁷⁸ Nearly a quarter of a century later similar actions were taken by President Roosevelt. On September 3, 1940, in the famous "Fifty Destroyer Deal," the President announced to Congress that he had exchanged fifty over-aged destroyers for British bases in the Western Atlantic, which were later occupied by American ships and troops.⁷⁹ In April, 1941, troops were sent to occupy Greenland, a Danish possession since 1814, under an arrangement with the Danish Minister in Washington—Denmark itself having been invaded by Germany on April 9, 1940. Two months later a similar occupation of Iceland, an independent nation, took place at that country's request, relieving the British troops which until then had occupied the strategic island. All of the troop movements involved were taken under Presidential authority as Commander in Chief for strategic reasons in insuring the defense of the Americas. All of the actions were easily subject to the interpretation that military force was being used to aid an enemy of Germany and might easily have led to immediate American involvement in the war.⁸⁰

It might be argued that the fact that a foreign country may look on the deployment of military force in certain situations as a threat requiring retaliation does not mean the President has exceeded his authority. The fact that by shaping and directing American foreign policy he can provoke a country into an attack does not mean he has

⁷⁴ See *id.* at 228-34.

⁷⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641-42 (1952) (Jackson, J., concurring) (referring, apparently with disapproval, to government claims of the scope of power conferred by commander-in-chief clause).

⁷⁶ See Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345, 383 (1955).

⁷⁷ Address before Congress, Feb. 26, 1917, in 54 Cong. Rec. 4273 (1917).

⁷⁸ Message to Congress, Apr. 2, 1917, in 55 Cong. Rec. 103 (1917).

⁷⁹ A short account of the incident and the debate which it touched off is given in T. Bailey, *A Diplomatic History of the American People* 718-20 (6th ed. 1958).

⁸⁰ See J. Rogers, *supra* note 7, at 68-71; E. Corwin, *supra* note 27, at 202-04.

unconstitutionally "initiated" war.⁸¹ At most, the argument continues, it is only the actual commitment of troops to combat, not their deployment in noncombat situations, which is subject to congressional control.

Where, however, military force is involved, there are strong arguments for recognizing limits on the employment of such force—by virtue of the war-declaring clause—regardless of whether such employment involves actual commitment to combat or mere deployment in friendly countries abroad in preparation for defense. The difficulty of distinguishing "mere troop deployment" from actual offensive employment against another nation is illustrated by the Greenland and Iceland examples. Secondly, even where forces are "peacefully" deployed abroad, a difficult problem arises if hostilities do in fact erupt, involving American troops in combat. An illustration is provided by one aspect of the current conflict in Vietnam. The incident which gave rise to the Gulf of Tonkin Resolution involved two alleged attacks by communist torpedo boats on a United States ship. It might be argued that this attack authorizes the war in which we are involved under the President's powers of self defense. If this argument were valid, the theoretical limits on the President's power to wage war would disappear in practice. Merely by sending troops to "hot spots" in the world, the President could insure that an attack on a foreign country would also be an attack on the United States troops stationed there. Although undoubtedly United States ships and troops abroad may defend themselves against attack without authorization, there must surely be a point when the attack has been repelled, and the enemy has indicated its hostilities are no longer directed at the United States, so that to continue the conflict or even to remain in the area would amount to aggressive war by the United States. Unlike an attack on United States territory proper, an attack on troops stationed abroad will generally still leave a decision to be made in determining whether the interest involved is worth the risk of war inherent in further military action. Since this is the type of decision which properly belongs to Congress, there are good reasons for requiring congressional approval before rather than after the conflict has started⁸² and, hence, at least where the likelihood of conflict is apparent, for requiring approval of the dispatch of troops in the first place.

III. PRESIDENTIAL POWER TO PROTECT AMERICAN RIGHTS AND INTERESTS ABROAD: MILITARY MEASURES "SHORT OF WAR"

For the most part the United States has escaped the type of attack which would justify presidential use of defensive war-making powers. By far the most difficult struggle between the President and Congress over the power to control the use of the military has occurred in at-

⁸¹ See p. 1777 and note 38 *supra*. Presidential control of foreign relations has in fact been the dominant factor in American entry into most of the major conflicts in our history. Of the nine conflicts through World War II which historians recognize as "wars," only five were "declared." The remaining four (the Naval War with France of 1798-1800, the Barbary War of 1801-05, the Second Barbary War of 1815 and the Mexican Hostilities of 1914-17 either were justified under the theory of self-defense or, arguably, were authorized by congressional resolution in some form. See J. Rogers, *supra* note 7, at 45-56. Even the "declared" wars, however, with the exception of the War of 1812, involved little more than mechanical congressional "recognition" of an existing state of war begun by the foreign country in response to American policies formulated largely by executive initiative. See E. Corwin, *supra* note 27, at 204; J. Rogers, *supra*, note 7, at 54-55. Such broad executive power over foreign relations argues for even closer scrutiny of whatever powers do remain to Congress to control the use of the military.

⁸² See p. 1796 *infra*.

tempting to decide what limits are to be placed on the President's power to use force in all other situations—situations where, though the country itself has not been attacked, its interests and national aims abroad are threatened and require force for their protection or advancement. Although the President early assumed the power to enforce all sorts of national aims⁸³ Congress' power to declare war, if it is not to be purely formal, must include the power to decide when the country will go to war to protect such aims. Formally, then, the problem is one of definition: under what circumstances does the use of force abroad—for whatever purpose—involve a commitment of the country to a trial of force of the sort which prompted the requirement for prior congressional consent?

A. The Historical Development

The reasons for assigning to Congress the power to decide whether to initiate war—namely, to insure broadly based approval of a step likely to entail serious economic, physical, or moral consequences⁸⁴—led to development of the notion that certain limited forms of military action, because they lacked such far-reaching consequences, are not “wars” and do not require prior congressional approval. The form which this theory assumed in the nineteenth century resulted in what might be called a “qualitative” definition of war. The basic theory was that force could constitutionally be used without congressional approval when employed “neutrally” with respect to foreign political entities.⁸⁵ The theory was spelled out in 1912 in an attempt to justify President Taft's employment of the armed forces in Nicaragua. In a carefully documented survey of nineteenth-century practice, the State Department drew a distinction between “intervention,” which included interference with the political concerns of another state or political faction, and “interposition,” which was confined solely to the protection of the persons or interests of the interposing country. Acts of the latter sort, it was argued, were justified under international law, and under the Constitution did not require ancillary legislation from Congress.⁸⁶ Most of the instances of presidential use of force during the nineteenth century can with varying degrees of success be reconciled with this theory.

The vast majority of the incidents involved landings to protect American property or lives abroad.⁸⁷ Generally undertaken during periods of disorder or civil unrest when local authorities could no longer provide protection against ordinary outlawry, these landings were, at least superficially, intended to maintain strict neutrality between contesting political factions.⁸⁸ The few landings to protect American treaty and other broad policy interests occurred primarily in the Canal Zone and, with the opening of Japan, occasionally also in the Far East. Again a similar pattern was supposedly followed: troops were stationed to protect the interests involved without direct interference in local political struggles.⁸⁹ A number of incidents involved

⁸³ See pp. 1776–77 *supra*.

⁸⁴ See p. 1775 *supra*.

⁸⁵ See R. Russell, *supra* note 5, at 242–43, quoted in National Commitments Report 11–12.

⁸⁶ U.S. Dep't. of State, Right to Protect Citizens in Foreign Countries by Landing Forces 24–34, 40, 44, 48 (3d rev. ed. 1934) (Memorandum of the Solicitor).

⁸⁷ See Legislative Reference Service, The Constitution of the United States of America—Analysis and Interpretation, S. Doc. No. 39, 88th Cong., 1st Sess. 541 n.9 (6th ed. 1964).

⁸⁸ Compare U.S. Dep't of State, *supra* note 86, at 33, with *id.* at 36.

⁸⁹ See *id.* at 34–38; R. Van Alstyne, American Diplomacy in Action 642 (rev. ed. 1947).

the use of force to suppress piracy and the slave trade.⁹⁰ Such action was said to be aimed not at any sovereign nation, but at scattered gangs of "criminals" unanimously branded as such by both domestic and international law.⁹¹ A similar theory was used to justify incidents involving punitive raids or reprisals against native islands and villages in so-called "uncivilized" areas of the world. These were generally undertaken in retaliation for crimes against citizens of the United States where normal diplomatic redress from the local natives was thought impossible. The practice was quick to fall into disuse as nearly all such "primitive areas" came under the protection of one or another European power.⁹² Finally, there were incidents where, in defending against attack or in suppressing outlaws, the President ordered "hot pursuit" of the attackers across the boundaries of another nation. Examples extend from President Monroe's orders to General Jackson in 1818 to pursue Indians in the South into Spanish territory of Florida to President Wilson's dispatch of troops in 1916 to pursue the Pancho Villa bandits across the Mexican border.⁹³

The complications with Mexican authorities which resulted from the latter expedition⁹⁴ illustrate how easily this "neutrality" theory is abused. Indeed, landings to protect American interests abroad must almost invariably affect internal political struggles. The very presence of American force, which can potentially aid a favorable government if a rebellion threatens to succeed and which at the very least relieves local troops from guard duty, will tend to result in support for the status quo⁹⁵ and is easily viewed as an intervention in a civil struggle. A prime example is furnished by President McKinley's action in the Boxer Rebellion in 1900. Without express authorization from Congress a naval force had been sent to China and was subsequently employed, not merely for the purpose of rescuing and protecting American lives and property, but also to aid in avenging and punishing the rebels. Yet the President continued to maintain that our aims were directed solely at the legitimate purpose of rescuing imperiled citizens and that no "war" was involved.⁹⁶

Finally, the President Roosevelt's intervention in Panama in 1903 the "neutrality" theory was apparently completely abandoned as a limit on the President's power to advance American interests through use of the armed forces. Invoking an 1846 treaty with Colombia which bound the United States to maintain the "perfect neutrality" of the Isthmus, Roosevelt ordered gunboats in the area to prevent Colombian troops from engaging the rebellious Panamanian "army."⁹⁷ The orders sent⁹⁸ and the actions taken strongly support the conclusion that military force was deliberately being used against the state of Colombia to establish a government more favorable to American canal interests.⁹⁹ The action set a precedent for later interventions and

⁹⁰ See National Commitments Report 11.

⁹¹ R. Russell, *supra* note 5, at 165-66.

⁹² *Id.* at 180-82.

⁹³ See C. Berdahl, *supra* note 14, at 65-67.

⁹⁴ See S. Bemls, *supra* note 44, at 552-53.

⁹⁵ See R. Russell, *supra* note 5, at 186.

⁹⁶ Message to Congress, Dec. 3, 1900, in 34 Cong. Rec. 4 (1900).

⁹⁷ The "army" consisted largely of 500 "bought" Colombian troops and members of the local fire department—a force which probably would have proved inadequate but for the use of American naval vessels to prevent Colombian troops from landing at Colon. See T. Bailey, *A Diplomatic History of the American People* 492 (6th ed. 1958).

⁹⁸ A collection of the correspondence including the orders sent to American ships in the area is contained in United States Senate, *Diplomatic History of the Panama Canal*, S. Doc. No. 474, 63d Cong., 2d Sess. 345-76 (1914).

⁹⁹ See generally T. Bailey, *supra* note 79, at 491-94; S. Bemls, *supra* note 44, at 513-15.

temporary occupations of countries in Central America and the Caribbean under President Roosevelt, Taft and Wilson.¹⁰⁰ Although frequent attempts were made to justify the intervention on previous theories of neutrality¹⁰¹ many of the actions taken were simply incapable of being accurately described as "neutral" with respect to the interest of foreign political entities.¹⁰²

Yet despite the apparent abandonment of the "neutrality" theory as a limit on presidential power to use force abroad, the "Panama Policy" of Roosevelt, Taft and Wilson was not necessarily inconsistent with the primacy of congressional war-making power. The states of the Caribbean were in no position to respond to American intervention with sufficient force to occasion a major conflict. So predominant was American might in this area of the world that Government publications were able to claim that a threatened revolution could usually be quieted by the mere arrival of an American cruiser.¹⁰³ From a purely military point of view the operations involved, even in the extended occupations of Haiti and the Dominican Republic, were for the most part minor affairs.¹⁰⁴ Hence, it is possible to conclude that "war" in the sense of article I, section 8, requiring congressional sanction, does not include interventions to maintain order in weak countries where a severe contest at arms with another nation is not likely to result.¹⁰⁵ Under such a "quantitative" definition of war, there was no infringement on Congress' power to initiate major conflicts.

B. The Modern Context: Diminishing Limits on the President's Power

1. *The Changed Setting.* — Though the history sketched above indicates a gradually shrinking interpretation of what is left to Congress by virtue of its power to declare "war," it is only during this century and particularly the last twenty years that the President has asserted powers over the military which, if taken at face value, all but reverse the original distribution between the Executive and Congress of the power to embark on war. The transformation has taken place against the background of a drastically changed factual setting which raises issues not easily answered by reference to history alone. The emergence of the United States at the turn of the century as a world power and the final, if somewhat reluctant, exchange after World War II of isolationist policies for "foreign entanglements" far beyond anything envisioned by the framers, make the question of the President's power to protect "broad American interests" far more relevant to the issue of Congress' power to initiate war than at any time in the nineteenth century. For the first time in its history American possesses a standing army, sufficiently large, sufficiently well-equipped, and sufficiently

¹⁰⁰ See generally S. Bemis, *supra* note 44, at 519-38.

¹⁰¹ See p. 1788, *supra*.

¹⁰² Compare the strict observance of neutrality in an incident mentioned in T. Roosevelt, an Autobiography 549 (1913) (to protect American property both sides were instructed to do their fighting outside the town, which was then given to the victor), with the clearly nonneutral incident described in S. Bemis, *supra* note 44, at 532 and n.1 (unhappy with Nicaraguan dictatorship, the United States employed American troops to help establish a new regime: bombardment of revolutionists was prevented on the grounds that it might injure American lives and property). Two methods of "interpreting the facts" to fit the neutrality theory developed. Actions were either described as intended to protect American lives and property without interference in local struggles, or, where American troops did take sides in the fighting, the opposing forces were labeled "bandits" or "outlaws," rather than members of a political entity. See F. Grob, *supra* note 9, at 231; Select Committee on Haiti and Santo Domingo, Inquiry Into Occupation and Administration of Haiti and the Dominican Republic, S. Rept. No. 794, 67th Cong., 2d Sess. 10, 12-14 (1922).

¹⁰³ See C. Beard, The Idea of National Interest 477 n.135 (1934).

¹⁰⁴ See F. Grob, *supra* note 9, at 231; cf. C. Beard, *supra* note 103, at 483-84. But cf. J. Rogers, *supra* note 7, at 74-78.

¹⁰⁵ See F. Grob, *supra* note 9, at 231-35.

mobile to make possible, through presidential action alone and on very short notice, conflicts of unforeseeable dimensions anywhere in the world.¹⁰⁶ Distinctions between "the power to initiate war," "the power to direct American foreign policy," and "the power to use military force" begin to vanish as the military weapon is integrated into foreign policy as simply another tool of diplomacy. To ask when and by whom war was "initiated" in Vietnam is to illustrate the difficulty of attempting to determine which of the steps in a gradually increasing commitment should have been taken by the President and which by Congress.

The same changed circumstances, however, also lend increased significance to the constitutional concern, embodied in the war-declaring clause, that Congress express the country's willingness to undergo the internal repercussions which military conflicts are likely to entail. The difficulty lies in attempting to accommodate this constitutional concern with the need, in at least some situations, for speed, secrecy, and efficiency—the inherent advantages of the Executive.¹⁰⁷

2. *Recent Precedents.*—The most striking illustration of the shift in the power to commit forces to combat is the Korean episode. Faced with the invasion of South Korea, President Truman after brief consultation with advisors, committed the nation's troops to repel the invaders.¹⁰⁸ At no time was congressional authorization sought for the full-scale conflict which resulted. Although there is considerable evidence that without immediate action Korea would have been overrun,¹⁰⁹ there is also evidence that the sequence of events¹¹⁰ left time to seek congressional approval and that failure to do so reflected a deliberate assertion of presidential prerogative.¹¹¹ Attempts were made to justify the decision on the grounds, *inter alia*, that the action was taken under the United Nations Charter, a part of both the treaty and international law which the President is constitutionally empowered to execute, and that the President was protecting "the broad interests of American foreign policy."¹¹² Significantly, though, constant attempts were made by the administration to describe the conflict, not as a "war," but as a mere "police action,"¹¹³ suggesting that, indeed, the President's power to use force to protect such interests was somehow limited to military measures short of war. The action, however, was clearly not "neutral" with respect to foreign political entities: equally clearly, the conflict was not a "minor" one. The nature and size of this country's commitment, however measured—number of troops, number of casualties, extent of emergency legislation, dollar cost¹¹⁴—warrant the conclusion that however the line between "major"

¹⁰⁶ In 1789, when the Department of War (now the Department of the Army) was established, the number of military personnel on active duty totaled 718. By 1812 the number had reached over 12,000. In the nineteenth century, with the exception of the years during and immediately following the Civil War, the total never significantly exceeded 50,000 until the Spanish-American War in 1898. It then increased to 200,000. For twenty years following World War I the average remained between 250,000 and 300,000. After reaching a World War II peak of 12.1 million in 1945, the total dropped to approximately 1.5 million (1947 to 1950) and, since 1950, has remained at approximately three million. See Bureau of the Census, U.S. Dep't of Commerce, *Historical Statistics of the United States*, Colonial Times to 1957, at 736-37 (1960).

¹⁰⁷ See E. Corwin, *supra* note 27, at 171.

¹⁰⁸ For the background to Truman's decision to enter the war see Hoyt, *The United States Reaction to the Korean Attack: A Study of the Principles of the United Nations Charter as a Factor in American Policy-Making*, 55 Am. J. Int. L. 45 (1961).

¹⁰⁹ See P. Seabury, *Power, Freedom, and Diplomacy* 216 (1963).

¹¹⁰ See generally R. Leckie, *The Wars of America* 850-58 (1968).

¹¹¹ *Id.* at 858.

¹¹² See U.S. Dep't of State, *Authority of the President to Repel the Attack in Korea*, 23 Dep't State Bull. 173 *passim* (1950).

¹¹³ See R. Leckie, *supra* note 110, at 858.

¹¹⁴ Cf. note 23 *supra*.

and "minor" is drawn this, at least, was the type of involvement which the war-declaring clause was meant to preserve for legislative approval.¹¹⁵

Largely as a consequence of the dissatisfaction which subsequently developed over "Truman's War," President Eisenhower, when confronted during his administration with the necessity for military intervention in Formosa (1955) and the Middle East (1957), hastened to seek congressional authorization for his action.¹¹⁶ Yet when troops finally were sent to Lebanon in the midst of its crisis with the United Arab Republic, Eisenhower claimed to be acting, not under the authority of the resolution, but under his inherent constitutional power to protect American lives and property abroad and to protect a nation whose independence was vital to United States interests and world peace.¹¹⁷

A joint resolution from Congress was also involved in the Cuban Missile Crisis in 1962. Passed one month before the quarantine proclamation, the resolution, as well as a resolution of the Organization of American States, was recited in the proclamation as authority for the action taken.¹¹⁸ Though the evidence is ambiguous, President Kennedy apparently also claimed the inherent power to take whatever military action was necessary for the protection of American security interests.¹¹⁹ President Johnson's landing of marines in the Dominican Republic in 1965 without congressional authorization was rationalized initially as necessary to protect the safety of American citizens,¹²⁰ and subsequently as an exercise of the President's power to preserve the security of the hemisphere in accordance with principles announced in the OAS Treaty.¹²¹ In the current conflict in Vietnam, although additional reliance is placed on the Gulf of Tonkin Resolution, the State Department also argues that even without the resolution current actions are fully within the constitutional authority of the President as Chief Executive and Commander in Chief.¹²²

All of these assertions share a single feature: following the precedent set during Korea, the theories which history has established with respect to the purposes for which the President may employ force abroad are heavily stressed, while the historical limitations which developed concurrently with those theories—if they did not in fact precede them—apparently are ignored. This shift in the manner used to justify presidential action is emphasized in the findings of the Senate Foreign Relations Committee in its recent report on national commitments¹²³ and is well supported by a comparison of recent and traditional presi-

¹¹⁵ Cf. R. Leckie, *supra* note 110, at 858; P. Seabury, *supra* note 109, at 208.

¹¹⁶ See T. Bailey, *supra* note 79, at 834-35, 844-45.

¹¹⁷ See Statement by the President, July 15, 1958, in 104 Cong. Rec. 13,903-04 (1958). The Middle East Resolution by its terms was limited to situations involving armed aggression by any country controlled by international communism. See Middle East Resolution, Pub. L. No. 85-7, § 2, 71 Stat. 5 (1957). There was, however, some suggestion by Secretary of State Dulles that the action was within the Eisenhower Doctrine, first, because the resolution did not require that the aggression be communist controlled, and second, because in any event this particular incident was communist inspired. See Krock, *Law and Intervention*, N.Y. Times, July 16, 1958, at 8, col. 4; *id.* at 3, col. 5.

¹¹⁸ See Presidential Proclamation No. 3504, 27 Fed. Reg. 10,401 (1962).

¹¹⁹ Cf. *id.*; Statement by President Kennedy, News Conference, Sept. 13, 1962, in N.Y. Times, Sept. 14, 1962, at 12, col. 1; *Hearings on National Commitments* 19. The Cuban incident is an example—undoubtedly one of many—where the more warlike branch was not the executive but the legislative. Many members of Congress were calling for far more drastic action than the President, including the invasion of Cuba. See N.Y. Times, Oct. 14, 1962, at 1, col. 6.

¹²⁰ See N.Y. Times, Apr. 29, 1965, at 1, col. 8; *id.*, Apr. 30, at 1, col. 8.

¹²¹ See Statement by the President, May 2, 1965, in N.Y. Times, May 31, 1965, at 10 col. 1.

¹²² See Memorandum, *supra* note 1, at 484-85.

¹²³ See National Commitments Report 13, 23.

dential rhetoric. Assertions recognizing a limit on the President's powers to use force abroad by virtue of Congress' war power are on record from Presidents Jefferson, Madison, Jackson, Buchanan, Lincoln, Grant, McKinley, Wilson and Franklin D. Roosevelt.¹²⁴ Although some of these statements may well be merely "gestures of obeisance to Congress' power to declare war,"¹²⁵ they nevertheless express recognition of a definite separation of powers in this area which, though incapable of precise definition and subject to easy abuse, at least requires some attempt to accommodate congressional interest in deciding what is worth the price of war with presidential determination to enforce and protect American interests. Any theory which purports to find a constitutional norm for such an allocation of power on the basis of an analysis of historical precedents will, by its very generality, be open to counter-examples. Yet the recognition that there are limits on executive military powers will at least direct efforts toward either constructing a more adequate theory or admitting that exceptional instance are departures from proper constitutional practice. To abandon recognition of such limits—even if only in the rhetoric¹²⁶—and to rely on an asserted inherent power to use force, apparently without restriction, to protect American "interests" makes such efforts pointless and should cause particular concern in an area where, as here, the only precedents on which future actions can be based are those set by the executive branch itself.

IV. THE PROPER ALLOCATION OF THE POWER: RESTORING THE CONSTITUTIONAL BALANCE

A. *The Relevance of the Constitutional Analysis*

Theoretically the federal courts could assume the role of answering questions about the constitutionality of specific military actions. The obvious occasion would be a suit by a draftee resisting service or a particular assignment on the ground that the conflict was illegal.¹²⁷ But in recognition of the likelihood of direct conflict with the Executive and the appropriateness of such questions for political resolution, the courts so far have refused to consider these questions.¹²⁸

In the absence of any final authority to whom appeal can be made or from whom enforcement can be sought, any attempt to brand particular conflicts as constitutional or unconstitutional is likely to be of little consequence. The constitutional analysis is better viewed as yielding a working directive to the executive and legislative branches that the commitment of the country to war be accomplished only through the closest collaboration possible, rather than an automatic formula for condemning or approving particular presidential action. The question should be: what concrete steps should the two branches take to assure that the policies behind the constitutional scheme are served?

¹²⁴ The statements are collected in Putney, *Executive Assumption of the War Making Power*, 7 Nat'l Unlv. L. Rev. I, 6-30 (May 1927).

¹²⁵ E. CORWIN, *supra* note 27, at 201.

¹²⁶ Since, with the exception of Korea and the Dominican Republic, congressional resolutions were involved in recent crises, presidential *practice* at least is not necessarily inconsistent with traditional recognition of congressional power to control use of the military.

¹²⁷ *See Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967); *United States v. Mitchell*, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967).

¹²⁸ *See* note 40 *supra*. For a review of some of the potential issues in such a suit see the dissenting opinions by Justices Stewart and Douglas in *Mora v. McNamara*, 389 U.S. 934, 934-39 (1967), *denying cert. to* No. 20,420 (D.C. Cir., Feb. 20, 1967).

B. Results of the Constitutional Analysis: Requiring Congressional Authorization for the Use of Force Abroad

1. *When Should Authorization Be Sought?—(a) Presidential Discretion.*—One position which might be taken in attempting to comply with this constitutional directive is that the respective roles of the Executive and the Congress in controlling the use of the armed forces should continue unaltered, following the general trend suggested, if not made completely explicit, by recent practice. Under an extreme form of this theory the President could continue to send troops abroad and even commit them to combat according to his interpretation of the needs of the broad policy and security interests of the country. While the President would still seek congressional approval when he determined that such a course was feasible, under the official policy these resolutions would neither be necessary for the action nor would they limit his ability to commit troops beyond the terms of the resolution.

In view of the constitutional policy favoring congressional authorization of war, this position must rest on the argument that it is impossible in the contemporary context to require anything less than ultimate executive control. The contention would be that in order to make the Constitution workable, the war-declaring clause must be interpreted to place minimum limits on the President's power to respond with speed and flexibility to meet military crises.¹²⁹

Even without traversing for the moment the basic premise of such a theory, the most that it could legitimately authorize would be presidential use of force in emergency situations where vital American interests would be jeopardized by the delay involved in any attempt to secure prior congressional action. But to equate all instances requiring the use of force with such emergencies seems clearly untenable. The position approaches acceptability only where there is no alternative which would allow greater participation by Congress while substantially preserving American interests.

(b) *"Major" Conflicts.*—An alternative is to require congressional authorization whenever the President's use of force, outside of the strict defense of the United States, is likely to result in a "major" conflict. Under this approach the purposes of the war-declaring clause would be satisfied by leaving for congressional action only the upper extremity of a whole scale of international conflicts of ascending intensity and scope.¹³⁰ Although there are obvious difficulties in attempting to draw a line on such a scale between "major" and "minor" conflicts, the theory assumes that at least there will be clear instances at both ends. The President would still be left with virtual discretionary power to decide when force must be used to protect American rights and interests, but he would be bound to seek congressional authorization where such action would be tantamount to initiating "war." Although the theory has considerable support in American history, in the present international context practical difficulties prevent the theoretical limitation from ever being employed as a guide for satisfying the constitutional norm for allocating control of the military.¹³¹

¹²⁹ It is questionable whether this argument can ever achieve constitutional respectability once it is admitted that control over the decision to go to war belongs to Congress in ordinary circumstances. Cf. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528 (1935) ("[e]xtraordinary conditions do not create or enlarge constitutional power"; Congress held to have exceeded its powers to regulate interstate commerce).

¹³⁰ See p. 1790 *supra*; cf. Osgood, *War and Policy*, in *American Defence Policy* 109, 114 (1965).

¹³¹ See Jones, *The President, Congress, and Foreign Relations*, 29 Calif. L. Rev. 565, 578-80 and nn.43-44 (1941); cf. Mathews, *supra* note 76, at 385.

(i) *Problems of Prediction*.—One of the major problems inherent in any theory which depends on a determination of whether a sequence of events will result in a sizable conflict is the impossibility of predicting which particular events are most likely to result in war.¹³² This is especially true in light of modern conceptions of the role of force in international politics. The use of the armed forces in a potentially explosive situation may, under the deterrence theory, actually lessen rather than increase the likelihood of war; but to pretend to be able to tell in advance whether war or peace will be the result of such action is to lay claim to a degree of prescience which few would find credible today.¹³³ These difficulties of prediction illustrate the crucial factual distinction between the context in which this quantitative limitation on the President's powers developed in the late nineteenth and early twentieth centuries and the context in which it is invoked today. At the time when the theory developed it was rare for such interventions to reach the stature of war.¹³⁴ The world had not yet achieved the uneasy stalemate of today in which every country is classified as friend, foe, or neutral and even the most minor skirmish which threatens to upset the balance raises the spectre of war of unknown dimensions. The unpredictability of the result of rushing troops to Lebanon,¹³⁵ the constantly revised predictions about the nature and extent of our involvement in Vietnam indicate that it can no longer be said with any degree of assurance that the commitment of troops to combat under any conditions is unlikely to result in major conflict.

(ii) *The Fait Accompli Problem*.—Lack of predictability would not be a serious problem if Congress could meaningfully decide whether to continue hostilities which have already commenced; but once our military forces are engaged, Congress often has little choice but to acquiesce! The de facto power of the President to present Congress with the *fait accompli* of a state of war has been demonstrated repeatedly in the past¹³⁶ and is reflected again today in aspects of the current Vietnam conflict.¹³⁷ This problem, too, has been aggravated by changed circumstances. With the assumption of worldwide commitments, the United States has come to occupy the center of a stage where indecision, a clash of wills between Congress and the President over the course to pursue in foreign affairs, or sudden "about-faces" in tactics is felt to discourage the confidence of our allies and encourage the actions of our enemies. The result is to make presidential action in the modern context largely irreversible.¹³⁸

(c) *Returning to the "Neutrality" Theory*.—The conclusion suggested by the above considerations is not that there can be no limits on the President's power to employ the armed forces,¹³⁹ but that a quantitative limitation can no longer serve as a satisfactory guideline for the proper allocation between the President and Congress of the power to commit troops to combat. If Congress' war power is not to

¹³² Mathews, *supra* note 76, at 385.

¹³³ Eisenhower's intervention in Lebanon, for example, was felt to have averted rather than precipitated a conflict, though at the time not even the President attempted to predict such a result. Compare N.Y. Times, July 24, 1958, at 5, col. 1, with *id.*, July 16, 1958, at 1, col. 8.

¹³⁴ J. Rogers, *supra* note 7, at 80; see M. Offutt, *supra* note 32, at 4.

¹³⁵ See note 133 *supra*.

¹³⁶ See note 81 *supra*.

¹³⁷ See p. 1804 *infra*.

¹³⁸ See E. Corwin, *supra* note 27, at 222.

¹³⁹ This is apparently the conclusion which critics of the "major conflict" theory reach. See Mathews, *supra* note 76, at 385.

become purely symbolic, there must be as much room as possible for congressional expression of its will prior to the use of force abroad for whatever purpose at least where such use is not "neutral" with respect to foreign political entities. Yet there are very few occasions today in which a truly "neutral" use of force is possible. Only the protection of American lives and property during civil disorder appears to remain as a possible candidate for such neutrality and even here the employment of the armed forces will generally be highly suspect. Intervention at the request of a local government to suppress a revolutionary guerrilla band usually is tantamount to taking sides in a political contest which, as Vietnam illustrates, may grow to unforeseeable dimensions when the rebels have external support or sympathizers. Consequently, every decision to commit troops to combat becomes a potential subject for congressional deliberation.¹⁴⁰ At the same time, however, it must be recognized that there will be cases where in the Executive's judgment there simply is no time to secure congressional authorization before acting. In such cases, where he believes that Congress would agree with his judgment that the interest at stake is worth defending at the risk of war,¹⁴¹ the President should be able to take action while simultaneously seeking congressional authorization. These cases should be few. None of the recent military actions appears to have involved such genuine urgency as to preclude congressional participation in the decision to employ the military.¹⁴² Even fewer should be the cases where the demands of secrecy preclude resort to Congress.¹⁴³ There will also be difficulties in determining the extent of the control over the armed forces which is to remain with the President as Commander in Chief.¹⁴⁴ To require congressional approval for every decision to deploy American troops is hardly either desirable or constitutionally required. Yet there will be some situations, such as the rushing of troops to Lebanon at that government's request which, although not involving immediate commitment to combat, so clearly entail the possibility of conflict that prior approval should be sought.

¹⁴⁰ The resolution which emerged from the recent hearings in the Senate Foreign Relations Committee expresses a similar sentiment:

"Resolved, That a commitment for purposes of this resolution means the use of, or promise to a foreign state or people to use, the Armed Forces of the United States either immediately or upon the happening of certain events, and

"That it is the sense of the Senate that, under any circumstances which may arise in the future pertaining to situations in which the United States is not already involved, the commitment of the Armed Forces of the United States to hostilities on foreign territory for any purpose other than to repel an attack on the United States or to protect United States citizens or property properly will result from a decision made in accordance with constitutional processes, which, in addition to appropriate executive action, require affirmative action by Congress specifically intended to give rise to such commitment." S. Res. 187, 90th Cong., 1st Sess. (1967). Although the resolution is ambiguous in crucial phases (Where is the United States "not already involved"? How does the "definition" of "commitment" in the first paragraph affect the meaning of "commitment" in the second paragraph? What is "specifically intended affirmative action by Congress"?), if interpreted to reflect the sentiment that presidential use of force must be restricted to cases where employed neutrally in order to preserve Congress' power to initiate war, the resolution seems an accurate description of the constitutional responsibilities of the President and Congress and a commendable attempt to restore the proper constitutional balance.

¹⁴¹ The effort to review and define the "national commitments" of the United States—the original focus of the hearings in the Senate Foreign Relations Committee, see *Hearings on National Commitments* 51—seems most relevant as a possible guide in making such a judgment.

¹⁴² *Id.* at 3.

¹⁴³ It has been suggested that the Bay of Pigs episode is an illustration of such a case. See R. Russell, *supra* note 5, at 425. A precedent for secret legislative proceedings to authorize the use of force against a foreign nation was established in 1811 in a series of acts authorizing the President to occupy and hold Florida against Spain. Apparently four such "secret laws" were passed, one of which, though referred to by Adams, has yet to be found. See C. Berdahl, *supra* note 14, at 46 n.12. See also Parry, *Legislatures and Secrecy*, 67 Harv. L. Rev. 737 (1954) (examining the success of the British Parliament in handling security matters through secret session during World War II).

¹⁴⁴ See pp. 1785–87 *supra*.

Other cases, such as the Greenland and Iceland examples where the movement of troops is hard to distinguish from a hostile employment of force against another nation, are also candidates for prior congressional authorization. But although the difficulty of drawing a line cannot be avoided and must ultimately be left to the discretion of the President, at least the general presumption in accordance with which that discretion is exercised would be reversed: instead of assuming that the President may deploy American forces as he sees fit and only in the exceptional case need he seek congressional approval, the presumption should be that congressional collaboration is the general rule wherever the use of the military is involved, with president initiative being reserved for the exceptional case.

2. *What Constitutes Authorization?*—The problem of what constitutes adequate congressional authorization where it is needed is intimately connected with the problem of whether Congress is capable at all of meaningfully participating in decisions involving the use of the armed forces. An excessively wooden concept of what constitutes congressional exercise of its power to declare war would have the effect, not of preserving congressional authority, but of transferring more and more decisions to the more flexible executive branch. At the other extreme, when the President can count on securing a blank check from Congress whenever he envisions the need to employ force abroad, congressional participation, whatever form it takes, is largely meaningless. Between these extremes, a balance must be sought which secures genuine participation by Congress in controlling the use of the armed forces, while still permitting sufficient executive flexibility to meet constantly changing developments.

(a) *Treaties as Authorization.*—A claim often heard today is that mutual defense treaties which commit the United States to come to the aid of an attacked ally serve as authorization to the President to use force if he deems it necessary in particular contexts for United States "aid" to take that form. The argument raises the question whether the congressional power to initiate war may be exercised by the Senate alone through the treaty power, rather than by both houses of Congress acting together. Further, even if the treaty power is a legitimate mode of authorizing use of the military instrument, the problem remains whether existing treaties can properly be interpreted to constitute such authorization.

(i) *Constitutional Limitations.*—The treaty-making power has been held not to extend "so far as to authorize what the Constitution forbids"¹⁴⁵—a limitation which has been construed to prevent the Senate and President from exercising by treaty a power exclusively vested elsewhere by the Constitution. Two such powers, cited in the past, are contained in article I, section 9 ("no money shall be drawn from the Treasury but in Consequence of Appropriations made by Law") and article I, section 7 ("all Bills for raising Revenue shall originate in the House of Representatives"). Although it has been argued that "appropriation by law" includes appropriation by treaty as part of the law of the land,¹⁴⁶ the provision has generally been construed otherwise: in order to implement treaties which require appropriations, a

¹⁴⁵ *Geofroy v. Riggs*, 135 U.S. 258, 267 (1899).

¹⁴⁶ See Feldler and Dwan, *The Extent of the Treaty-Making Power*, 28 Geo. L.J. 184, 192 (1939); McDougal and Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 Yale L.J. 181, 306 (1945).

statute and, hence, independent legislative action by both houses is needed.¹⁴⁷ The debate whether article I, section 7 similarly forbids revenue-affecting provisions in treaties¹⁴⁸ has become largely academic through the use of congressional-executive agreements and statute.¹⁴⁹

The question remains whether the war-declaring power, like the power to control appropriations and, arguably, revenue laws, also requires participation by the House of Representatives. The language of the Constitution itself offers nothing to distinguish this provision from any of the other enumerated powers in article I, section 8, most of which have been the subject of treaties.¹⁵⁰ Indeed the same clause which gives Congress the power to declare war also confers the power "to Make rules concerning Captures" which has long been shared with the treaty power.¹⁵¹ Yet despite these considerations, there remains serious doubt that action by the Senate alone meets the general intention of the framers respecting congressional involvement in war decisions. The possibility of giving the Senate alone the power to declare war was specifically considered and rejected. According to Madison's notes, Mr. Butler pointed out that objections based on the slow proceedings of the House were equally true of the Senate. Mr. Mason opposed giving the power of war to the Senate "because [it was] not constructed as to be entitled to it." Both he and Mr. Ellsworth felt that it should be easier to get out of war than into it and hence, that while it would be sufficient to give the Senate alone power to ratify peace treaties, the entire "legislature" had the power of war.¹⁵² These notes seem to indicate a deliberate intent to include the House of Representatives, with its popular representation, in the war-making decision.

(ii) *Treaty Interpretation*.—Regardless of the outcome of the constitutional issue, there is considerable support for the conclusion that none of the existing collective security and treaty agreements to which the United States is a party is by its terms designed to alter the distribution of the war-making power. A typical example of the guaranty provisions contained in such agreements is article five of the North Atlantic Treaty:¹⁵³

"The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them * * * will assist the Party or Parties so attacked by taking * * * *such action as it deems necessary*, including the use of armed force * * *."

When the treaty was submitted for ratification the contention that the United States was automatically committed to go to war in the event that one of the other members was attacked was specifically rejected

¹⁴⁷ See I. W. Willoughby, *The Constitutional Law of the United States*, 549-52 (2d ed. 1929); Legislative Reference Service, *supra* note 87, at 469-70; McLaughlin, *The Scope of the Treaty Power in the United States*, 42 Minn. L. Rev. 709, 756-57 (1958).

¹⁴⁸ Arguably, a treaty is not a "bill" to raise revenues and, hence, is free from article I, section 7's requirement that such bill originate in the House of Representatives. See I. W. Willoughby, *supra* note 147, at 558. See generally H.R. Rep. No. 2680, 48th Cong. 2d Sess. (1884).

¹⁴⁹ See I. W. Willoughby, *Supra* note 147, at 559; Legislative Reference Service, *supra* note 87, at 470.

¹⁵⁰ See E. Corwin, *The President's Control of Foreign Relations* 2 (1917); McDougal and Lans, *supra* note 146, at 217-18.

¹⁵¹ See Q. Wright, *The Control of American Foreign Relations* 299, 355 n.45 (1922). An example is the Hague Convention of 1907 limiting the rights of belligerency. See E. Corwin, *supra* note 27, at 425 n.23.

¹⁵² See 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 318-19 (rev. ed. 1937).

¹⁵³ North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2244 (1949), (T.I.A.S. No. 1964 (emphasis added)).

in the Senate Committee Report and by the Secretary of State. The signatories, it was explained, were to be left free to decide for themselves in each instance what action was necessary.¹⁵⁴

Partly to avoid the debates provoked by the NATO treaty over this issue, subsequent treaties have adopted language from the United Nations Charter¹⁵⁵ which even more clearly illustrates the neutrality of their obligations with respect to the internal distribution of the war-making power. Thus, article IV of the SEATO treaty provides that in the event of armed attack on any member each signatory will "act to meet the common danger in accordance with its constitutional processes"; article IX requires that "the Treaty shall be ratified and its provisions carried out by the Parties in accordance with their respective constitutional processes."¹⁵⁶ Similar language in each of the forty-two mutual defense pacts to which the United States is a party¹⁵⁷ has led to general agreement that current postwar security treaties have not changed the relative powers of Congress and the President with respect to the use of the armed forces.¹⁵⁸

(b) *Implied Authorization: Appropriations and Congressional Inaction.*—In addition to legislative instruments specifically authorizing use of the military it has been urged that where Congress under its power to raise and support armies¹⁵⁹ makes appropriations to support military operations abroad, such action constitutes at least implied approval of the President's war making and serves as authorization to continue the campaign. The difficulty with the argument is that since such appropriations must generally come after the hostilities have already begun, the effective choice remaining to Congress is likely to be severely limited. The "approval" which is expressed by the fact of such appropriations (in order not to "desert our fighting boys") is not unlike the "approval" of President Theodore Roosevelt's action expressed by Congress' appropriating the money to bring back the fleet he sent halfway around the world.¹⁶⁰ The more blatant the *fait accompli* which forces Congress' hand, the less should exercise of its power of appropriation be taken as "consent" to the action. Even where there is no *fait accompli*, if the power over appropriations had been thought a sufficient safeguard against presidential war making, it becomes difficult to understand why the framers were so concerned about withholding the war power from the Executive in the first place. Although it may be admitted that an appropriations bill could be introduced under circumstances which leave room for no interpretation

¹⁵⁴ See D. Cheever and H. Haviland, *American Foreign Policy and the Separation of Powers* 128 (1952); McLaughlin, *supra* note 147, at 676.

¹⁵⁵ Article 43 of the Charter describes the special agreements to be made by member nations in fulfilling their obligations to make armed forces available to the Security Council on certain conditions. It concludes with the provision that such agreements "shall be subject to ratification by the signatory states in accordance with their respective constitutional processes." U.N. Charter art. 43, para. 3 (emphasis added).

The question which governmental department had the power to determine for the United States the number of troops to be placed at the disposal of the Security Council was settled by Congress in the United Nations Participation Act, 22 U.S.C. § 287d (1964). The Act provides that any special agreement negotiated by the President respecting the number and type of armed forces to be made available must be submitted to Congress for its approval. "[T]he controlling theory of the act is that American participation in United Nations shall rest on the principle of departmental collaboration, and not on an exclusive presidential prerogative in the diplomatic field." E. Corwin, *supra* note 27, at 221 (emphasis deleted).

¹⁵⁶ Southeast Asia Collective Defense Treaty, Sept. 8, 1954, art. IV, para. 1, art. IX, para. 2, [1955] 1 U.S.T. 81, T.I.A.S. No. 3170.

¹⁵⁷ See *Hearings on National Commitments* 96-97.

¹⁵⁸ See *id.*: National Commitments Report 15; note 67 *supra*.

¹⁵⁹ See note 6 *supra*.

¹⁶⁰ See J. Rogers, *supra* note 7, at 83-84.

other than "a vote for the bill is a vote for the war," it is hard to see why, even in such cases, resort to implied rather than express authorization is necessary. If the issue at stake in voting for the appropriation really is so clear, a separate resolution to that effect, expressly authorizing the use of the appropriation for a specific military endeavor abroad will avoid later problems of "proving" congressional intent not evident on the face of the bill.

A variation of this argument is that failure of Congress to reduce appropriations or limit the size of the armed forces to a level which would make impossible continued prosecution of a war indicates consent to continuing the action. In addition to the objections raised above, arguments which rely on congressional inaction to show congressional approval completely shift the responsibility for initiating the war from Congress to the Executive. Further, the burden of securing a majority is shifted from those favoring to those disapproving authorization—a not insignificant factor in the political arena.

(c) *Resolutions as Authorization.*—The claim has been made that where authorization is needed nothing short of a formal declaration of war will satisfy the Constitution's demand for congressional control of the war power.¹⁶¹ It is difficult, though, to find any rationale for such a claim. In addition in the absolescence and general undesirability of a formal declaration today,¹⁶² the claim finds support neither in the language of the Constitution, the intent of the framers, the available historical and judicial precedents nor the purposes behind the clause. The framers' desire to vest the war power in Congress is in no way defeated by allowing Congress through joint or concurrent resolutions or acts of Congress to deliberate and decide whether or not to authorize specific military undertakings. As early as President Adams' administration similar procedures short of a formal declaration were followed to authorize the "undeclared war" with France¹⁶³ and were apparently accepted as entirely appropriate by courts considering claims which arose out of the conflict.¹⁶⁴ Since that time the use of the resolution, especially in recent years, has become the predominant means by which congressional participation in the decision to commit troops to combat has been sought.

But though potentially the resolution could serve as a vehicle for congressional participation in the decision to commit troops to combat, it is easily turned into nothing more than a device for rubber-stamping executive decisions. A resolution authorizing the president to use armed forces without restriction for whatever purposes he saw fit would seem an improper delegation of Congress' power because of its lack of sufficiently articulated standards. Two Supreme Court opinions, however, indicate that at least with respect to matters connected with foreign relations a wide latitude will be given to executive and congressional judgment of what constitute sufficient standards, and hence, a proper delegation of authority by Congress to the President.¹⁶⁵

¹⁶¹ See Lawyers Committee, *supra* note 2, at 2672-73.

¹⁶² See pp. 1772-73 *supra*.

¹⁶³ Act of July 9, 1798, ch. 68, 1 Stat. 578; Act of May 28, 1798, ch. 48, 1 Stat. 561; see C. Berdahl, *supra* note 14, at 83-84.

¹⁶⁴ See *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800); *Talbot v. Seeman*, 5 U.S. (1 Cr.) 1, 28 (1801) (Marshall, C. J.) ("[i]t is not denied, nor in the course of the argument, has it been denied, that congress may authorize general hostilities").

¹⁶⁵ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (concurring opinion); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 324 (1936). The latter case has been interpreted as withdrawing "virtually all constitutional limitation upon the scope of congressional delegation of power to the President to act in the area of international relations." Jones, *The President, Congress and Foreign Relations*, 29 Calif. L. Rev. 565, 575 (1941).

Yet considerations similar to those involved in the delegation doctrine are involved in determining the propriety of the resolution as a means of congressional authorization. The dangers are illustrated by recent practice. The resolutions on Formosa, the Middle East, Cuba and Vietnam are all ambiguous at best with respect to the function they are supposed to serve. At times specific words of authorization are employed, at other times only general words of encouragement and approval.¹⁶⁶ Usually presented in the context of an immediate crisis they are unable to suggest a specific plan of action, but are confined to offering vague measures of support for the President in carrying out a still undefined policy. Conscientious congressmen express concern that a blank check is being given to the President, and subsequent State Department interpretations of the scope of the authority granted do little to allay such fears.

Not all of these difficulties can be avoided: many of them are the inevitable result of the inability to foresee crises and predict their outcome. Others can be remedied in part by recognizing the significance of the resolution: that it *does* confer authority, potentially, to embark on war and that, therefore, the scope of authority should be clearly and unambiguously expressed. Where problems of predictability seem insurmountable, limited authority should be granted by providing for expiration and renewal after a specified time and by confining the authorization to specific areas and specific purposes.

Much of the burden of making such resolutions meaningful devices for securing congressional consent must fall on Congress itself. The temptation to shift to other shoulders the responsibility for a decision as distasteful as that of entering into war or authorizing the use of force has no doubt been partly responsible for congressional lack of concern in the past over presidential intrusion into this area. In situations where real emergencies are involved and unilateral executive action may be required, the burden falls on Congress either to voice its disapproval or give its consent without needless delay. To claim well after the fact of intervention that the country is now so involved that Congress has no real choice will invoke little sympathy if Congress' own delay in expressing its opinion has helped accomplish the fact. Finally, prophylactic measures such as a current review of the extent and nature of United States commitments may prove desirable.¹⁶⁷ With the lessons of the Vietnam War as a guide both to the sacrifices those commitments may entail and the difficulties in interpreting authorizing resolutions, a careful review of the language of those commitments may avoid later difficulties.

V. CONCLUSION: VIETNAM

Under the analysis in this note the validity of the President's actions in Vietnam depends on whether or not specific congressional approval has been secured for the war which has developed. The action is not a response to an attack on or a declaration of war against the United States. In terms of troop commitment and

¹⁶⁶ Compare Formosa Resolution, Pub. L. No. 4, ch. 4, 69 Stat. 7 (1955) ("the President * * * hereby is authorized to employ the Armed Forces of the United States"), with Middle East Resolution, Pub. L. No. 85-7, § 2, 71 Stat. 5 (1957) ("if the President determines the necessity thereof, the United States is prepared to use armed forces").

¹⁶⁷ See p. 1797 and note 141, *supra*.

casualties—which now exceed those of the Korean War¹⁶⁸—the conflict, excluding the Civil War, has become the third largest in American history: it is “war” within the meaning of article I, section 8. Current treaty agreements, in particular the SEATO Treaty, do not purport to serve as authorization for such a war. Such authorization, if it has been secured, must be found in the Gulf of Tonkin Resolution, which provides a clear example of both the difficulties and potentialities inherent in the resolution as a device for securing congressional consent.

The first clause of that resolution states that “the Congress approves and supports the determination of the President as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.”¹⁶⁹ The clause alone hardly represents more than a congressional rallying around the flag in response to the attack on a United States ship, and merely approves what could obviously be done without such approval: the repelling of an attack on American armed forces. Were this the entirety of the resolution, present operations would be justified only under the implausible construction that they were a continuing and necessary defensive response to the Gulf of Tonkin incident.¹⁷⁰ The second section, however, proclaims that “the United States * * * prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.”¹⁷¹ This rather comprehensive language certainly supports the interpretation given it by the administration: that it is a functional equivalent of a declaration of war¹⁷² and as such the President may conduct the war as he sees fit. He has the power to bomb North Vietnam¹⁷³ and presumably even China if that is deemed necessary to defend South Vietnam’s freedom.

Despite apparent statements to the contrary when the bill was being debated,¹⁷⁴ Senator Fulbright claims, however, that there was no understanding that the resolution extended to the authorization of war.¹⁷⁵ In his defense it must be admitted that the circumstances surrounding the passage of the resolution hardly lent themselves to minimizing misunderstandings. The resolution was presented in an atmosphere of great urgency immediately after the attack. This factor, coupled with the allusions to that attack and the request for approval of a response to it, creates a strong suspicion that the implication of the second section were overlooked. Although such a result is surely as much the fault of Congress as of the administration, under the circumstances, compliance with the principle that Congress be given the closest possible participation in such decisions would have demanded at the least that prior to the decision the following year vastly to increase the commitment of troops to the area, congressional reassertion of its approval be sought. Arguments have

¹⁶⁸ See N.Y. Times, March 15, 1967, at I, col. 5.

¹⁶⁹ Vietnam Resolution, Pub. L. No. 88-408, § 1, 78 Stat. 384 (1964).

¹⁷⁰ See p. 1787 *supra*.

¹⁷¹ Vietnam Resolution, Pub. L. No. 88-408, § 2, 78 Stat. 384 (1964).

¹⁷² See *Hearings on National Commitments*, 82 (testimony of N. Katzenbach, Under Sec’y of State); 110 Cong. Rec. 18,409-10 (1964).

¹⁷³ See 110 Cong. Rec. 18,409 (1964).

¹⁷⁴ See *id.* at 18,403-04, 18,409-10 (1964).

¹⁷⁵ See National Commitments Report 21.

been for the view that this is what was done in the May, 1965 appropriations request: the administration expressly stated that the request was not for a routine appropriation, but was being made as a means of presenting the Vietnam issue.¹⁷⁶ At the same time, however, the President made clear that the additional funds were needed to "protect our men and supplies"¹⁷⁷ and to provide them with modern equipment, thus illustrating the difficulty in attempting to construe such appropriations as equivalent to explicit authorization for the war. At best, the Gulf of Tonkin Resolution, even coupled with subsequent appropriations, leaves unclear the extent to which congressional authorization of the war has been expressed.

With respect to the future, the problem can be avoided by placing a strict time limit on the resolution, giving Congress adequate time to deliberate and review the resolution and encouraging the Executive to seek further specific support later. With respect to the present, although the *fait accompli* problem can no longer be avoided, the ambiguity is best resolved, not by relying on Congress' failure to repeal the resolution as provided for in the third clause,¹⁷⁸ but by resubmitting for congressional approval a resolution specifically phrased to give consent to the war.

¹⁷⁶ Message to Congress, May 4, 1965, in Senate Comm. on Foreign Relations, 90th Cong., 1st Sess., Background Information Relating to Southeast Asia and Vietnam 160-63 (Comm. Print 3d rev. ed. 1967); see Moore and Underwood, *The Lawfulness of United States Assistance to the Republic of Viet Nam*, in 112 Cong. Rec. 15,519, 15,557-58 (1966).

¹⁷⁷ Message to Congress, May 4, 1965, *supra* note 176, at 160.

¹⁷⁸ "This resolution * * * may be terminated * * * by concurrent resolution of the Congress." Vietnam Resolution, Pub. L. No. 88-408, § 3, 78 Stat. 384 (1964).

INDOCHINA: THE CONSTITUTIONAL CRISIS*

The dispatch of American troops into Cambodia by the President, without specific authorization by Congress, raises serious questions about the constitutional allocation of power between the legislative and executive branches. The most significant factor in the resolution of such questions is the presence or absence of action by each branch.

The power to commit American forces to combat was originally entrusted to Congress, which retained it almost unchallenged for over a century. But in the twentieth century, Congress has passively allowed the effective ability to engage the United States in hostile actions abroad to be assumed almost entirely by the Presidency.

Proposals now before Congress invoke the money power as a means of asserting control over the Indochinese War. If Congress exercises its money power to prohibit specific uses of the armed forces, it will reassert its long dormant capacity firmly and constitutionally to limit the President's ability to use the armed forces for purposes which Congress does not approve.

I. THE LANGUAGE OF THE CONSTITUTION

The power to commit American troops to battle was allocated by the Constitution between the President and Congress. (The relevant clauses of the Constitution are quoted in the Appendix.) The President is entrusted with the executive power,¹ made Commander in Chief of the Army and Navy,² and, with the advice and consent of the Senate, empowered to make treaties and appoint ambassadors.³ The Congress is empowered to lay taxes to provide for the common defense,⁴ to define and punish offenses against the law of nations,⁵ to declare war,⁶ to raise and support armies (but not to finance them for more than two years at a time),⁷ to provide and maintain a navy,⁸ to make rules for the land and naval forces,⁹ and to provide for calling up and organizing the militia.¹⁰

II. THE ORIGINAL UNDERSTANDING

The Constitution does not say explicitly whether the army may be sent into battle when Congress has not declared war, or if it may, under what circumstances and by whose decision. In interpreting the

*Prepared by students at the Yale Law School, New Haven, Conn., May 1970.

¹ Constitution of the United States of America, art. 2, sec. 1.

² *Ibid.*, art. 2, sec. 2, clause 1.

³ *Ibid.*, art. 2, sec. 2, clause 2.

⁴ *Ibid.*, art. 1, sec. 8, clause 1.

⁵ *Ibid.*, art. 1, sec. 8, clause 10.

⁶ *Ibid.*, art. 1, sec. 8, clause 11.

⁷ *Ibid.*, art. 1, sec. 8, clause 12.

⁸ *Ibid.*, art. 1, sec. 8, clause 13.

⁹ *Ibid.*, art. 1, sec. 8, clause 14.

¹⁰ *Ibid.*, art. 1, sec. 8, clause 15 and clause 16.

Constitution on this point, it is helpful to look at the intent of the Framers and to the understanding of the men who first put the Constitution into practice.¹¹

The Constitutional Convention debated the clause giving Congress the power to declare war on August 17, 1787.¹² The clause originally empowered Congress "to make war."¹³ Some delegates objected that the power should lie with the executive, as it did in England.¹⁴ Most of the Convention seemed firmly of the opinion that the power should lie with Congress, but that the President should have the power to defend against a sudden attack. The Convention decided to "insert 'declare,' striking out 'make' war, leaving to the executive the power to repel sudden attacks."¹⁵ The Framers had in mind a division of functions. The President, as Commander in Chief, was charged with the conduct of hostilities after they are legally begun. He was also expected to take measures to repel any actual attack upon the United States, as an incident of his executive power. But the power to initiate hostilities was clearly meant to be reserved to the Congress, with the President participating in that initiative only so far as his signature was necessary to complete an act of Congress. Thus, *the President, unless his veto is overridden, may prevent war, but he cannot constitutionally act alone to begin a war.*

The judicial branch was also quick to conclude that Congress alone can declare war. Delivering the opinion of the Supreme Court in an 1801 prize case, Chief Justice John Marshall concluded that the "whole powers of war" were "vested in Congress."¹⁶

There may, however, be hostilities which fall short of requiring an actual declaration of war. Ten years after the adoption of the Constitution, the naval trouble between the United States and France which had begun under Washington became so acute that American shipping was greatly endangered.¹⁷ President Adams had to decide what to do. Alexander Hamilton advised the administration against action without Congressional authority:

¹¹ For an exhaustive analysis of the historical development of the war power see the article by Francis D. Wormuth, "The Vietnam War: The President versus the Constitution," on which this paper draws heavily. It is reprinted in Falk, ed., *The Vietnam War and International Law*, Princeton University Press, 1969.

¹² James Madison, *Notes of Debates in the Federal Convention*, Ohio University Press edition, 1966.

A transcript of Madison's notes on the debate on the war power is included in the appendix to this paper.

¹³ *Ibid.*, debate of Aug. 17, 1787 (Ohio edition, 476).

¹⁴ *Ibid.*, remarks of Mr. Butler (see appendix). For a discussion of the English allocation of power, still accurate when the Constitution was written, see John Locke, *Second Treatise on Government* (1690), chs. 12 and 13, sec. 145.

Mr. Gerry remarked that he "never expected to hear in a republic a motion to empower the Executive alone to declare war."

¹⁵ *Ibid.*, the motion passed eight States to one, Massachusetts absent (see appendix).

¹⁶ *The Amelia*, 1 Cranch (5 U.S. (1801)). Chief Justice Marshall wrote:

"The whole powers of war being, by the Constitution, vested in Congress, the acts of that body alone can be resorted to as our guides in this inquiry."

"The case involved a ship whose seizure would have been legal under the President's privateering proclamation, but whose seizure the Court held was illegal under the terms of the Act of Congress which authorized the proclamation. The privateer was made to pay damages to the ship's owner."

¹⁷ After the outbreak of the war between France and England in 1792, American shipping was molested by the blockades of both nations. President Washington met the challenge with his famous Neutrality Proclamation, which kept the United States out of the conflict. By 1798, however, French depredations on American commerce had become so menacing that action was needed to protect it. The question was whether President Adams could do so on his own authority or whether he needed the authority of Congress.

"In so delicate a case, in one which involves so important a consequence as that of war, my opinion is that no doubtful authority ought to be exercised by the President."¹⁸

Adams decided to wait for Congress to act, and it passed laws authorizing him to protect American commerce.¹⁹ Similarly in 1801, President Jefferson was faced with hostilities on the Barbary Coast, but felt that he could order only defensive measures until Congress authorized him to commit forces to offensive action.²⁰

In the first two limited wars in which the United States found itself, both Adams and Jefferson had the means to order retaliatory action immediately. Perhaps some lives and property would have been saved had they done so. But both clearly felt that the decision to commit American forces was not constitutionally theirs to make, and preferred the preservation of the Constitutional process to the pursuit of a temporary military advantage.

III. HISTORICAL DEVELOPMENT OF THE WAR POWER

A. Wars and Limited Wars in the Nineteenth Century

If the President's power to engage American forces in hostilities on his own initiative is limited to defensive action by a strict construction of the Constitution, the question of the proper role of Congress arises. Congress clearly has the power to engage the United States in formal war, as it did in 1812 with the President reluctantly assenting.²¹ It may declare war at the request of the President.²² And Congress may also ratify after the fact hostilities begun by the President.²³

The executive branch very early recognized the exclusive power of Congress to declare war. In the course of a dispute with Spain in 1805, President Jefferson told Congress:

Considering that Congress alone is constitutionally invested with the power of changing our position from peace to war, I have thought it my duty to await their authority before using force in any degree which could be avoided.²⁴

Similar deference to the sole power of Congress to make any decision to commit the United States to war was voiced by President

¹⁸ Alexander Hamilton to James McHenry, the Secretary of War, May 17, 1798 (quoted in Wormuth, *op. cit.*).

¹⁹ Congress suspended commercial intercourse with France in the act of June 13, 1798, augmented by the act of Feb. 9, 1799 (1 Stat. 565, 1 Stat. 613). It denounced the treaty with France in the act of July 7, 1798 (1 Stat. 578). It created the Department of the Navy by the act of Apr. 27, 1798 (1 Stat. 553). And it established the Marine Corps by the act of July 11, 1798 (1 Stat. 594). The controversy with France is describe in note 17, above.

²⁰ The Barbary States, particularly Tripoli, had been marauding American shipping, in an attempt to exact a payment of tribute from the United States. When the promised tribute was not paid, Tripoli declared war on the United States. President Jefferson sent ships to the Mediterranean, but authorized them only to defend themselves and other American ships. The Navy captured a Tripolitan ship, but released it after disarming it, as the President told Congress:

"Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries." Thomas Jefferson, first annual message, Dec. 8, 1801, *Messages and Papers of the Presidents* (1908), vol. 1, p. 326.

²¹ Act of June 18, 1812 (2 Stat. 155).

²² Act of Apr. 20, 1898 (30 Stat. 738), containing the ultimatum to Spain, and the act of Apr. 25, 1898 (30 Stat. 364), declaring that a state of war had existed since April 21.

²³ Act of May 13, 1846 (9 Stat. 9), and act of Aug. 6, 1861 (12 Stat. 326).

²⁴ *Messages and Papers of the Presidents*, vol. 1, p. 389.

James Monroe,²⁵ Secretary of State John Quincy Adams,²⁶ and Secretary of State Daniel Webster.²⁷

The Congress itself was jealously aware of its war power, and on one occasion nearly censured the President for invading it. In 1846 it had declared, after the fact, that a state of war existed with Mexico. But the debate was bitter and the war unpopular. At the end of the war, the House of Representatives voted its thanks to General Taylor, but amended its resolution to note that he had won "A war unnecessarily and unconstitutionally begun by the President of the United States."²⁸

Among the Congressmen supporting the amendment were former President John Quincy Adams and future President Abraham Lincoln.

Congress also has considerable power, short of a declaration of war, to authorize and regulate limited hostilities, as it has done on a number of occasions, with and without executive approval, since 1798.²⁹

During the nineteenth century, the executive branch frequently recognized the need for congressional authorization even for limited military actions. In 1857 the Secretary of State refused to send ships to help a British expedition in China, because he lacked congressional authority to do so.³⁰ The next year President Buchanan pleaded with Congress for authority to protect transit across the isthmus of Panama, but refused to act without it.³¹ Nor in 1876 would the State Department use force to help Americans in Mexico, because it felt it

²⁵ In 1824 Colombia notified the United States that it was threatened by France, and asked for protection. The Monroe Doctrine had been announced the year before, but the administration would not commit itself to defend Colombia. President Monroe wrote to Former President Madison that: "The Executive has no right to compromise the nation in any question of war." Letter of Aug. 2, 1824, quoted in Wormuth *op. cit.*

²⁶ Three days after Monroe's letter to Madison, Secretary of State Adams formally wrote to the Minister of Colombia to the United States: "By the Constitution of the United States, the ultimate decision of his question belongs to the Legislative Department of the Government." John Quincy Adams to Jose Maria Salazar, Aug. 6, 1824.

²⁷ In 1851 Hawaii asked the United States for protection from France. Secretary of State Daniel Webster refused to help: "I have to say that the war-making power rests entirely with Congress and that the President can authorize belligerent operations only in the cases expressly provided for by the Constitution and the laws. By these no power is given to the Executive to oppose an attack by one independent nation on the possessions of another." J. B. Moore, *Digest of International Law*, Washington, Government Printing Office, vol. 7, p. 163.

²⁸ *Congressional Globe*, 30 Cong., first sess., p. 95, Jan. 3, 1848.

The Mexican War had been precipitated in 1846 by President Polk's dispatch of American troops into a territory whose possession was disputed with Mexico. After hostilities erupted, Congress reluctantly declared that a state of war existed between the United States and Mexico.

The resolution referred to was a vote of thanks to General Zachary Taylor, the Commander of the successful American forces. The clause censuring the President was moved as an amendment to that resolution. The amendment was adopted on Jan. 3, but was dropped when the resolution came up for a final vote.

²⁹ For the 1798 legislation, see note 19 above.

Congress authorized the President to act against Tripoli in the act of Feb. 6, 1802 (2 Stat. 129).

In 1839, in the course of a dispute over the boundary of Maine, Congress authorized the use of force against England in the act of Mar. 3, 1839 (5 Stat. 355). Force was never needed.

In 1890 the Congress passed an act, which became law without the President's signature, authorizing the use of force to extract an indemnity for the seizure of American ships off Venezuela—Act of June 17, 1890 (26 Stat. 674). The indemnity was secured by arbitration.

³⁰ Secretary of State Lewis Cass wrote the British Government that:

"Under the Constitution of the United States, the executive branch of this Government is not the war-making power. The exercise of that great attribute of sovereignty is vested in Congress, and the President has no authority to order aggressive hostilities to be undertaken * * *. Military expeditions into the Chinese territory cannot be undertaken without the authority of the National Legislature." Moore, *op. cit.*, vol. 7, p. 164.

³¹ President Buchanan told Congress that:

"The executive government of this country in its intercourse with foreign nations is limited to diplomacy alone. When this fails it can go no further. It cannot legitimately resort to force without authority of Congress, except in resisting and repelling hostile attacks." *Messages and Papers of the Presidents*, vol. 5, p. 616: Message of Dec. 6, 1858.

lacked the power to do so.³² As late as 1911 President William Howard Taft felt that he had enough power to move troops to the Mexican border, to be ready in case Congress told him to protect American lives and property endangered by the revolution there, but refused to send them in on his own authority.³³

B. Erosion of the Congressional War-Making Power in the Twentieth Century

In the early part of the twentieth century, the executive began to exercise greater discretion in the use of American armed forces abroad. For instance, without specific congressional approval, President Theodore Roosevelt sent American troops into Panama in 1903 and President Wilson sent troops into Mexico in 1916 in pursuit of the Pancho Villa bandits.³⁴

Since 1945, the executive has regularly used military force abroad as a tool of diplomacy. Aside from Indochina, the greatest use of American force was in Korea, where several hundred thousand troops were committed to combat and major casualties were incurred. There was neither a formal declaration of war, nor any other specific congressional sanction for the Korean conflict.³⁵ American forces were sent into the Formosan Strait in 1955, into Lebanon in 1958, and into the Dominican Republic in 1965. The Navy was used to blockade Cuba during the missile crisis in 1962. And, most recently, naval vessels were dispatched to the vicinity of Haiti and Trinidad in response to internal conflicts in those countries. Prior congressional resolutions were obtained by the President only for the Formosan, Lebanese, and 1962 Cuban actions, but both the validity of those resolutions and the degree to which Presidents Eisenhower and Kennedy relied on them has been questioned.³⁶

The application of prior historical precedents to unilateral executive use of armed force abroad in the mid-twentieth century can, however, be misleading. For instance, as precedents for the Vietnam War, a State Department Memorandum cites a long series of military actions

³² Acting Secretary of State Hunter wrote :

"The President is not authorized to order or approve an act of war in a country with which we are at peace, except in self-defense. This is a peculiarity of our form of government, which at times may be inconvenient, but which is believed to have proved and will in the future be found in the long run to be wise and essential to the public welfare." Moore, *op. cit.*, vol. 7, p. 167.

³³ In his third annual message, President Taft told Congress :

"The assumption by the press that I contemplate intervention on Mexican soil to protect American lives or property is of course gratuitous, because I seriously doubt whether I have such authority under any circumstances, and if I had I would not exercise it without express congressional approval."

Despite presidential protestations to the contrary, a diluted but similar recognition of the need for congressional approval of limited hostilities lay behind the requests for the Formosa resolution of 1954, the Middle East resolution of 1957, and the Gulf of Tonkin resolution of 1964.

³⁴ See generally, Reveley, "Presidential War-Making: Constitutional Prerogative or Usurpation?" 55 Va.L.Rev. 1243, 1257-63 (1969).

President Wilson sent American troops into Vera Cruz in 1914 on his own authority, but he had asked Congress for an enabling act the day before the troops were used, and the day after the landing Congress ratified his actions.

³⁵ See, "Congress, The President and the Power to Commit Forces to Combat," in *The Vietnam War and International Law*, v. 2 (Falk ed. 1969) at 616, 636-37. This article originally appeared as a Note in the Harvard Law Review, 81 Harv.L.Rev. 1771 (1968). Much of the content and many of the arguments in this memorandum have been drawn from this note. Hereinafter it will be cited as the "Harv. Note" with page citations to the Falk collection.

³⁶ See, Moore, "The National Executive and the Use of Armed Forces Abroad," in Falk *supra* (n. 35) at 809, 817. This was originally an address given by Professor Moore at the Naval War College on Oct. 11, 1968 (hereinafter cited as "Moore Address" with page citations to the Falk collection) ; and see Harv. Note at 627.

ordered by the President alone.³⁷ But the majority of military actions undertaken by the executive without congressional approval took place in the nineteenth century. Most of them were not actions that involved conflicts with foreign states; rather, the bulk of them involved the protection of individuals, police actions against pirates or actions against primitive peoples. Furthermore, the United States did not have a significant standing army during peacetime until after 1945, and the President was limited in the military actions that he could take by the need to approach Congress to ask for any increase in the size of the armed forces. *Today, with a tremendous military machine and modern transport at his immediate disposal, the President is under little practical pressure to seek congressional authorization for his actions, and therefore he is unlikely to seek it unless Congress insists that he do so.*³⁸

IV. THE THEORETICAL BASES FOR UNILATERAL PRESIDENTIAL ACTION

The theories on which various Presidents have relied for the use of military force abroad without congressional approval may be divided into three general categories: (1) the sudden attack theory; (2) the neutrality theory; and (3) the collective security theory.³⁹

(1) *The Sudden Attack Theory.*—The President as the Chief Executive has the inherent power to defend the sovereignty and integrity of the nation itself and to respond to an armed attack on the territory of the United States without requesting congressional approval. In the absence of an armed attack on American territory proper, the power of the President is more closely circumscribed. *Purely defensive measures are appropriate; but an escalation of the hostilities, entailing the risk of war, is beyond the power of independent Presidential action under the sudden attack theory.*⁴⁰

In the event of an armed attack on the territory of the United States proper, there is little question that the executive possesses the power to respond with all means at his disposal. Congressional approval of such action would probably be immediate. When, on the other hand, an attack is made on American persons or property abroad, then the response should generally be proportional to the attack. The recent "Pueblo Incident" is a striking example of the fact that not every use of force against the United States is an act which places the country at war and that a variety of factors should enter into the development of an appropriate response. Short of an attack which threatens the life of the country, therefore, it seems that the President's power under the sudden attack theory is fairly limited.

There is also the danger of provocation, either planned or accidental. The mere presence of American forces near a hostile nation may provoke a "sudden attack." Consider, for instance, the U-2 incident in 1960, the various RB-47 incidents, the "Pueblo Incident." If

³⁷ U.S. Department of State, "The Legality of United States Participation in the Defense of Viet-Nam," 54 Department of State Bulletin 474 (1966), reprinted in "Symposium—Legality of United States Participation in the Viet Nam Conflict," 75 Yale L.J. 1084 (1966). [Hereinafter cited as State Department memo.]

³⁸ As precedent for Vietnam, however, the majority of the nineteenth century uses of force do not survive close scrutiny. Most were minor undertakings, designed to protect American citizens or property, or to revenge a slight to national honor, and most involved no combat, or even its likelihood, with forces of another state. To use force abroad on a notable scale, the President would of necessity have had to request Congress to augment the standing army and navy. Reveley, *supra*, n. 8, at 1258.

³⁹ See generally, Harv. note.

⁴⁰ See generally Harv. note at 624, 631.

the response to such an attack is not limited, then the country may become involved in a much larger conflict with little or no executive-legislative collaboration.

(2) *The Neutrality Theory*.—Also known as “interposition,” the neutrality theory was developed during the nineteenth century as a justification for American military involvement abroad to protect American citizens and property. When American armed forces were sent into a foreign nation, their presence was supposed to be “neutral” with respect to any conflicts there. *The executive, in taking such action, was not necessarily “making war” but merely dispatching troops to act as security guards for American citizens and their property. The real difficulty, clearly, was in remaining neutral and avoiding conflict.*⁴¹

(3) *The Collective Security Theory*.—Since 1945, the United States has entered into many security treaties with foreign nations. Many of these agreements have clauses which indicate that the security of each signatory is vital to the security of each other signatory. Unilateral presidential action under these agreements is justified as necessary for the protection of American security even though the conflict may arise thousands of miles from American shores. *Carried to its extreme, the collective security theory would justify almost any unilateral presidential use of armed force abroad,*⁴² *a result clearly contrary to a strict construction of the Constitution.*

⁴¹ See generally, Harv. Note at 634; Reveley, *supra* (n. 34) at 1257 et seq.; and Velvel, “The war in Viet Nam: Unconstitutional, Justiciable and Jurisdictionally Attackable,” 16 Kan. L. Rev. 449 (1968). (Caveat: Prof. Velvel’s article is highly one-sided.)

Modern analogues of the “neutrality theory” were the landing of troops in the Dominican Republic in 1965 and the recent dispatch of American naval vessels to the area around Haiti and Trinidad.

The real problem with the neutrality theory is remaining neutral. “Interposition” may easily lead to “intervention” and the Congress may be faced with a fait accompli. President Roosevelt accomplished an actual “intervention” in Panama in 1903 by “interposing” American troops there under an executive order, ostensibly to protect American property and citizens, but actually to support a friendly government.

However, American citizens who live or own property abroad probably should be able to expect some degree of aid from their government in time of conflict. But if the President has an unfettered right to employ the American military anywhere at anytime to protect American property, Congress may be left without an opportunity to assert its views. And, in many cases, the risks of deployment may be greater than the risks of restraint.

⁴² See generally, State Department Memo; Alford, “The Legality of American Military Involvement in Viet Nam: A Broader Perspective,” 75 Yale L. J. 1109 (1966); Harv. Note at 627 et seq.; cf., Memorandum of Lawyers’ Committee on American Policy toward Viet Nam, 112 Cong. Rec. 2552–59 (daily edn. Feb. 9, 1966).

Almost every national in the world has become classified as friendly, hostile, or neutral, and conflicts which might have seemed minor fifty or a hundred years ago are now often viewed as dangerous because they tend to upset the precarious world order and balance of power. Consequently, the idea of American security has expanded greatly so that an armed conflict in a far part of the world may appear to be a threat to the security of the United States itself. Unilateral Presidential employment of armed forces abroad, under the collective security theory has, therefore, been justified on much the same grounds as unilateral executive action under the sudden attack theory. The physical territory of the United States may be in no immediate, or even distant, danger. There may be no immediate threat to American forces, citizens, or property, but a conflict may seem to endanger the worldwide security system of the United States. The argument for Presidential action under the collective security theory is that the executive must have the power to respond quickly and forcefully to attacks which are considered important, for a variety of reasons, to the maintenance of the balance of power.

The executive action in Indochina has been premised largely on the collective security theory. The Indochina War and other recent American military actions serve to indicate that the neutrality theory is no longer viable. In a world which is divided into friendly, hostile, and neutral countries, most armed conflicts will probably affect the existing order. It is difficult, if not impossible, therefore, for American intervention in such conflicts to remain wholly neutral.

The notion that the United States possesses extraterritorial security interests is not novel. The Monroe Doctrine of 1823 is a clear example. But the proliferation of bilateral and multilateral security agreements since the end of World War II has widened American security interests to include most of the world.

Accepting the general premise of the collective security theory, the question is: who determines when the security interest of the United States is threatened, the President or Congress? And who determines what response is to be taken to protect that interest?

V. THE JUSTIFICATIONS FOR UNILATERAL EXECUTIVE ACTION IN INDOCHINA

The involvement of the United States in Vietnam, the commencement of an air war in Laos, and the expansion of the ground war into Cambodia have resulted almost entirely from executive decisions and actions. The executive branch of the government has justified its action primarily on the grounds of: (1) the presidential prerogative to protect American security interests abroad by whatever means necessary; (2) the SEATO treaty; and (3) the Gulf of Tonkin Resolution.⁴³ *It cannot be said that the recent actions by the executive in Cambodia or the earlier actions in both Vietnam and Laos are clearly contrary to the Constitution. However, the expansion of the war into Cambodia is the latest in a long series of acts which, taken together, have nearly stripped Congress of its war power.*

(1) *The Presidential Prerogative.*—Undoubtedly, the speed with which crises develop in the modern world necessitates a strong executive who can respond quickly to such crises. The need for a speedy response, the need for secrecy, the need to protect American citizens and property abroad, and the need to protect American security interests in the balance of power are all used to legitimize the use by the executive, without congressional approval, of American armed forces abroad. Recent United States actions, especially in Korea and Indochina, are cited to support great executive discretion in the use of American military force abroad. The recent invasion of Cambodia without prior congressional approval or even notice is not without historical precedent and not without justification under a broad interpretation of the collective security theory.⁴⁴

However, the real question is whether the balance has shifted too far in favor of the executive.⁴⁵ A war, such as the one in Indochina, requires great sacrifices on the part of great numbers of the American people. It is difficult, if not impossible, to predict the ultimate outcome of any American intervention. Consequently, when there is a possibility of large scale American involvement and even a limited risk of war, Congress should decide on the desirability of American military action. Congress represents a wide spectrum of views and is closer and more responsive to the wishes of the electorate.⁴⁶

The executive has also placed reliances on the power of the President as chief formulator of foreign policy and as Commander in Chief of the armed forces. *Granted that the President does have primary responsibility in the modern world for the handling of foreign policy, he should not have the discretion to initiate war as an instrument of foreign policy.*

Finally, the Commander in Chief provision of the Constitution is an expression of civilian control over the military; it does not give the war power to the President.⁴⁷

⁴³ See generally, State Department memo.

⁴⁴ See text and notes, *supra*.

⁴⁵ If the balance has shifted too far in favor of the executive, then Congress must share the blame for its failure to act in the past. Is there any real concern or is it acceptable for the President to have primary responsibility for the use of American force abroad?

There is certainly a strong argument in favor of giving the executive the ability to respond with speed and force to crises which constitute a *direct* threat to the security of the United States. (See Harv. Note at 640.) But, there are equally strong, if not stronger, arguments in favor of increased congressional control over executive actions which may involve the United States in lengthy conflicts that are costly both in terms of lives and economic resources.

⁴⁶ See generally, Moore address.

⁴⁷ Velvel, *supra* (n. 41) at 457.

(2) *The SEATO Treaty*.—The Southeast Asia Treaty Organization is one of the many multilateral collective security treaties which the United States has signed. Neither South Vietnam nor Cambodia is a signatory, but both countries are within "protocol areas" which the signatories consider to be vital to their security interests.⁴⁸ The terms of the treaty are ambiguous, and it is at least questionable whether the United States was obligated by the terms of the treaty to come to the aid of South Vietnam.⁴⁹

More importantly, the SEATO agreement cannot help answer the constitutional questions, because it specifically states that action by a signatory in response to an attack on another signatory or a "protocol country" is to be made only after a decision made according to the "constitutional processes" of the signatory.⁵⁰

The more relevant issue is the power of the President to involve American forces in foreign combat on the basis of a treaty. The Constitution requires that the Senate must give its advice and consent to any treaty before it can become effective.⁵¹ Once approved, the treaty is of the same nature as any other duly passed law which the executive is bound to execute faithfully.⁵² If, however, the war power is a congressional prerogative, the decisions regarding the initiation of war should be made by both houses of Congress and not just the Senate.⁵³

(3) *The Tonkin Gulf Resolution*.—Following reported attacks on American naval vessels in the Gulf of Tonkin in August of 1964, Congress passed a joint resolution which gave the President broad discre-

⁴⁸ The full text of the SEATO Treaty may be found in 6 U.S. Treaties 81; T.I.A.S., No. 3170; 209 U.N. Treaty Series 28; and Falk, *supra* (n. 35) at 561 and seq. The signatories were: Australia, France, New Zealand, Pakistan, Philippines, Thailand, the United Kingdom, and the United States.

The Protocol to the SEATO Treaty provides in pertinent part that:

"The parties to the Southeast Asia Collective Defense Treaty unanimously designate for the purposes of Article IV of the Treaty the states of Cambodia and Laos and the free territory under the jurisdiction of the state of Vietnam." 6 U.S. Treaties 87; T.I.A.S., No. 3170; 209 U.N. Treaty Series 36; Falk, *supra* (n. 35) at 564.

Laos was removed from the "protocol area" by the Geneva Accords of 1962. See Protocol to the Declaration on the Neutrality of Laos, T.I.A.S. 5410; Falk, *supra* (no. 35) at 568.

Article IV goes to the core of the collective security agreement:

"1. Each party recognizes that aggression by means of armed attack in the treaty area against any of the parties or against any state or territory which the parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes. Measures taken under this paragraph shall be immediately reported to the Security Council of the United Nations.

"2. If, in the opinion of any of the parties, the inviolability or the integrity of the territory or the sovereignty or political independence of any party in the treaty area or of any other state or territory to which the provisions of paragraph 1 of this article from time to time apply is threatened in any way other than by armed attack or is affected or threatened by any fact or situation which might endanger the peace of the area, the Parties shall consult immediately in order to agree on the measures which should be taken for the common defense.

"3. It is understood that no action on the territory of any state designated by unanimous agreement under paragraph 1 of this article or on any territory so designated shall be taken except at the invitation or with the consent of the government concerned.

⁴⁹ See generally, Falk, "International Law and the United States Role in the Viet Nam War," 75 Yale L. J. (1966); Falk, "International Law and the United States Role in Viet Nam: A Response to Professor Moore," 76 Yale L. J. 1095 (1967); but cf. Moore, "International Law and the United States Role in Vietnam: A Reply," 76 Yale L. J. 1051 (1967).

⁵⁰ Art. IV, par. 1 of SEATO Treaty, *supra* (n. 48).

⁵¹ Constitution, art. 2, sec. 2, clause 2.

⁵² *Id.*, art. 2, sec. 3. However, the treaty is rendered of no effect if it conflicts with subsequent legislation, since the lawmaking power of Congress is equally as potent as the treaty power.

A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty. *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1870); accord, *Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 160 (1934); *Moser v. United States*, 341 U.S. 41, 45 (1951).

⁵³ See Harv. Note at 643-46. The possibility of giving the war power to the Senate alone was specifically considered and rejected by the framers. See, appendix on the debate in the Constitutional Convention.

tion to respond to "aggression" in Southeast Asia.⁵⁴ Congressional action which does not amount to a formal declaration of war may be a valid congressional authorization of hostilities,⁵⁵ and some commentators think that the Tonkin Gulf Resolution is an adequate congressional authorization for the Vietnamese War.⁵⁶

There are two factors, however, which make the Tonkin Gulf Resolution a questionable basis for the American military action in Indochina. First, it was passed with great speed and in the heat of emotion that resulted from the reported attack on American naval vessels in the Tonkin Gulf.⁵⁷ Secondly, there were few American troops in Vietnam in the summer of 1964 and there were no separate American ground combat forces there.⁵⁸

It has also been argued that congressional inaction and failure to repeal the Tonkin Gulf Resolution give implicit authorization to the Indochina War. The logical outcome of such an argument is that the President can do whatever he wishes and the Congress has the affirmative duty to try to stop him. This shifts the presumption of the Framers in favor of congressional control over war-making and gives the initial and continued upper hand to the executive.⁵⁹

VI. THE OPPORTUNITIES FOR REASSERTION OF CONGRESSIONAL POWER

The power of the purse is the last bastion of popular control of the government.⁶⁰ Congress now has the opportunity to use this power to restore the constitutional balance by including in authorization acts any of a number of restrictions on the use of American funds and forces in Indochina. More forcefully than a resolution of one or both houses,^{60a} enacting specific restrictions on the use of our military forces

⁵⁴ Southeast Asia Resolution, Aug. 10, 1964, Public Law 88-408 (H.J. Res. 1145); 78 Stat. 384. The resolution is also reprinted in Falk, *supra* (n. 35) at 579.

⁵⁵ See e.g. opinion of Chief Justice Marshall in *Talbot v. Seeman*, 5 U.S. (1 Cr.) 1, 25 (1801). And, as former Secretary of Defense McNamara has said, "There has not been a formal declaration of war—anywhere in the world—since World War II." Address to American Society of Newspaper Editors, May 18, 1966, *New York Times*, May 19, 1966, p. C-11, col. 1 (city edn.) at col. 2.

⁵⁶ See generally, Moore address; Alford, *supra* (n. 42); Moore and Falk articles, *supra* (n. 49).

Whether the Tonkin resolution is sufficient authority for the Cambodian invasion and the air action in Laos has not been considered by the legal commentators thus far, but the language of the resolution is so broad that it could, arguably, authorize almost any American action in the Western Pacific area. See, remarks of Senators Fulbright and Cooper during debate on the resolution, 11 Cong. Rec. 18409-410 (1964).

⁵⁷ One commentator, however, does argue that Congress had sufficient information to form a reasonable opinion about the possible consequences of the resolution, and that it was perhaps an unfortunate, but not unconstitutional abdication of responsibility. See, Moore address at 821, and see generally, Moore and Underwood, "The Lawfulness of United States Assistance to the Republic of Viet Nam," 112 Cong. Rec. 14943, 14960-67, 14983-89 (daily edn., July 14, 1966.)

⁵⁸ It is at least questionable whether a resolution passed in response to a relatively minor attack on American warships was sufficient authorization for a war in which has resulted in more American casualties than any war except the Civil War and World Wars I and II.

It has also been argued that Congress has given its implied approval to the Indochinese war because it has passed military authorization bills for the area. The argument based on enactment of military appropriations legislation is specious. The authorization of expenditures for the support of the soldiers in Southeast Asia was necessitated by the executive fait accompli in dispatching forces there. And, if the framers had thought that the money power by itself gave Congress sufficient control over the military, there would have been no need to grant Congress the explicit war power. See generally, Harv. Note at 646.

⁵⁹ Harv. Note at 646.

⁶⁰ The power of the purse was the weapon used by the English Parliament to combat the exercise of despotic power by Charles I and James II. The framers of the Constitution were certainly aware of its utility as a guarantee of the powers and privileges of the legislature.

^{60a} The resolutions now before Congress, though carrying important political impact, would affect the constitutionality of subsequent executive action. If a resolution were made before the initiation of hostilities, Presidential commitment of American forces or significant expansion of the war would be precluded because the resolution would be a clear assertion of the primacy of Congress in the making of war. See, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring). Once forces were involved in combat the resolution would prohibit expansion of hostilities.

in Indochina and directing their withdrawal would effectively assert congressional control of the limited war in which we are now engaged. Proposed restrictive provisions (such as those advanced by Senators McGovern, Hatfield, Hughes, and Goodell)⁶¹ are not only a legitimate exercise of Congress' money power, but pose no danger of inflexibly committing our policy to a hazardous course because (1) they include exceptions which insure the safety of our forces and (2) they may be overridden by future congressional action if circumstances change.

A. Specifically restricting the use to which military forces may be put is a legitimate exercise of congressional power

There is no doubt that under the Constitution Congress has complete control over governmental use of funds. Historical precedent, textual analysis of the Constitution, the intent of the Framers, and judicial construction unambiguously indicate that the money power may be used to restrict the President's control of the armed forces.

Past congressional success in the restriction of military policy through the use of specific provisions in money acts offers conclusive support for the legitimacy of such a measure to control the military actions of the President. Riders and amendments on appropriation and authorization acts traditionally have been a device favored by Congress to restrict and to control executive actions.^{61a} The most recent example is Section 643 of the Defense Appropriation Act for the current fiscal year, passed in 1969, which states that "none of the funds appropriated by this Act shall be used to finance the introduction of American ground combat troops into Laos and Thailand."⁶² *Last year's rider alone serves as clear precedent for similar restrictions on use of forces or funds in Cambodia or in Vietnam itself.*

An almost identical restriction was enacted by Congress in the Selective Service and Training Act of 1940, which included the proviso that:

Persons inducted into the land forces of the United States under this Act shall not be employed beyond the limits of the Western Hemisphere except in the Territories and possessions of the United States, including the Philippine Islands.⁶³

It appears that in the past Presidents have always complied with such restrictions, even when they originally expressed an intention to

⁶¹ Such restrictions should be distinguished from the so-called "legislative veto," which reserves to Congress or one of its components the right to determine the actual effect of the restriction by subsequent action falling short of actual legislation, such as disapproval by committee action or a resolution of one or both houses.

It is arguable that the inclusion of specific dates on which these restrictions take effect is an invasion of the inherent powers of the President as Commander in Chief. According to a strict construction of the Constitution, the President's inherent power may be limited to the power to repel sudden attacks only by immediate and temporary action. The expansion of his power through its unopposed exercise may be determinative of its constitutionality when Congress does not act, but it may be limited by Congressional action. The important question is whether the proposed limitation is reasonable. Since there is no indication that compliance with these restrictions is not fully feasible, there is no reason why the will of Congress should not be respected on this issue. The authors thus reject the argument.

^{61a} Harris, *Congressional Control of Administration*, 213-215 (1964); Huzar, *The Purse and the Sword*, 211, 220, 240 (1950).

⁶² 83 Stat. 469 (1969). The inclusion of the phrase "in line with the expressed intention of the President of the United States," whatever its value as a face-saving device for the President, detracts not at all from the force of this proviso. The full text of the amendment reads:

"In line with the expressed intention of the President of the United States, none of the funds appropriated by this Act shall be used to finance the introduction of American ground combat troops into Laos or Thailand."

⁶³ Act of Sept. 16, 1940 (54 Stat. 885).

ignore them.⁶⁴ Compliance by the executive is, in fact, clearly dictated by the Constitution.

The general grant to the President of the executive power⁶⁵ is qualified by the admonition that "he shall take care that the laws be faithfully executed."⁶⁶ The powers of Congress to raise and appropriate revenues, to raise and support armies, and to provide and maintain a navy, are all law-making powers.⁶⁷ *An appropriation rider enacted into law would therefore impose a clear constitutional obligation on the President to abide by its provisions.*⁶⁸ In addition, it would constitute a *pro tanto* repeal of previous statutes granting the President discretion to use funds for military purposes.

The President's power as Commander in Chief does not free him from enacted restrictions. The Constitution has granted to Congress the fundamental power to create the resources employed by the branches of the government. *The Commander in Chief clause merely entitles the President to the supreme command of the armed forces*

⁶⁴ In 1955, for instance, Congress attached a rider, sec. 638, to the Defense Appropriation Act prohibiting use of funds appropriated therein "for the disposal or transfer by contract or otherwise of work that has been * * * performed by civilian personnel of the Department of Defense unless justified to the Appropriations Committee(s) * * *" 69 Stat. 321 (1955). A threat to Congress' constitutional powers arose when, in a message to Congress, the President stated that sec. 638 was unconstitutional and declared that "to the extent that this section seeks to give to the Appropriations Committees of the Senate and the House of Representatives authority to veto or prevent Executive action, such section will be regarded as invalid by the executive branch of the government * * * unless otherwise determined by a court of competent jurisdiction." 101 Cong. Rec. 10459-60, 10416, 84th Cong., first sess. (July 13, 1955).

But despite this threat, the Defense Department complied in full with the provisions of sec. 638. The Department reported, as required by the act, and agreed to delay action to accommodate Congress. And after the Armed Services Subcommittee of the House Appropriations Committee formally denied permission to dispose of several operations employing civilians, the President and the Defense Department followed its directions during the time that sec. 638 remained law. Carper, *The Defense Appropriation Rider* (1960).

The response of the Comptroller General to this crisis adds further support to the position of Congress. A month after the President had made his threat, the Comptroller General informed Congress that "On the fundamental basis that it is for Congress to say how and on what conditions public moneys should be spent, the position of the GAO, as the agent of Congress, must be, in this case and always, to accord full effect to the clear meaning of an enactment by the Congress so long as it remains unchanged by legislative action and unimpaired by judicial interpretation." *Id.* Therefore, he concluded, where a violation were found he would exercise his power as Comptroller General to disallow credits in the agencies accounts and hold the officers personally liable for the cost of the illegal activity. *Id.* Although sec. 638 was an example of the use of the legislative veto, it serves as a valid indication of expectable Executive response to an unequivocal restriction, particularly since the legislative veto is open to possible attack as a circumvention of the constitutionally required lawmaking process.

⁶⁵ U.S. Constitution, art. I, sec. 1.

⁶⁶ U.S. Constitution, art. II sec. 3.

⁶⁷ U.S. Constitution, art. I, secs. 8, 9.

⁶⁸ Even if the President acts beyond the constitutional limits of his powers, "Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution in the Government of the United States, or any Department or officer thereof." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952).

Whatever the merits of the arguments about the President's power to impound funds, such practices under which the executive exercises discretion within the limits set by Congress in appropriations acts can be clearly distinguished from a more clearly unconstitutional breach by the executive of restrictions on positive action. See, e.g., Fisher, "Presidential Impoundment of Funds," 38 Geo. Wash. L. Rev. 124, 130 (1969); Davis, "Constitutional Power to Require Defense Expenditures," 33 Fordham L. Rev. 39, 40-41, 55 (1964).

within the limits established by the legislation which created those forces, provided the limits are reasonable.⁶⁹

The fundamental importance of the money power is evident from the determination of the Framers to place this power firmly in the hands of Congress. Particular care was taken to maintain under congressional control the use of funds for military purposes, as indicated by the constitutional provision that no money may be appropriated for the army "for a longer term than two years."⁷⁰ The rationale for the allocation of power made by the Framers of the Constitution is basic to our concept of democracy: that the legislators, as representatives of the people, should have complete control over the nation's resources. Madison described the money power in these terms:

This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people.⁷¹

The wisdom of this grant of power is borne out by recent history. The conduct of the Indochinese War has precipitated a widespread disillusionment with the government, and attendant loss of respect for law. *If the people, through their representatives, have no control over the commitment of their resources to war-making, the result is a betrayal of the democratic principles of the Constitution.*

The Supreme Court spoke most directly to the issue in the *Steel Seizure Case*,⁷² concluding that the powers of the President, both as Commander in Chief and in his executive capacity, were not unlimited and could be restrained by another branch of the government.⁷³ All the Justices in the majority indicated that the extent to which Congress had acted to control the action taken by the President, seizure of most of the nation's steel mills, was significant in determining the constitutionality of his action.⁷⁴ The opinions imply that *when Congress speaks*

⁶⁹ In the words of Justice Black:

"The Constitution is neither silent nor equivocal about who shall make laws which the President is to execute * * *. The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control * * *. The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952).

Other judicial pronouncements on the "raise and support" and appropriations clauses have construed them to give Congress power to control the creation of military forces. One early opinion stated the argument succinctly: "The power of congress to raise and support armies * * * is clear and undisputable. The language used in the constitution in making this grant of power is so plain, precise and comprehensive, as to leave no room for doubt or controversy, as to where the supreme control over the military force of the country resides." *In re Griver*, 16 Wisc. 423, 431 (1863).

Another court has stated the conclusion more forcefully: "The purpose of the appropriations, the terms and conditions under which said appropriations were made, is a matter in the hands of Congress and it is the plain and explicit duty of the executive branch of the government to comply with the same." *Spaulding v. Douglas Aircraft Co.*, 60 F. Supp. 985, 988 (S.D.Cal. 1945), affirmed 154 F.2d 419 (9th Cir. 1946).

⁷⁰ U.S. Constitution, art. I, sec. 8.

⁷¹ *The Federalist*.

⁷² *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952).

⁷³ For instance, Justice Frankfurter felt that the absence of Presidential power would have been beyond contention "had Congress explicitly negated such authority in formal legislation." *Id.* at 602.

Rejecting the view that the Commander in Chief clause supports "any Presidential action, internal or external, involving the use of force," Justice Jackson concluded that "Congress alone controls the raising of revenues and their appropriation and may determine in what manner and by what means they shall be spent for military and naval procurement." *Id.* at 643.

⁷⁴ The much-noted concurring opinion of Justice Jackson stated the proposition in more detail:

Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. * * * When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb. * * * Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting on the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system. *Id.* at 635-638.

on the question of what form executive action may take, such power to act alone as the President may have will be circumscribed. In the Steel Seizure Case, the Justices disagreed on the proper interpretation Congress' failure to act on relevant legislation; in contrast, if Congress enacts a clear prohibition on military action in specified areas of Indochina, the meaning would be clear, and presidential power would be effectively limited.

B. Continuing congressional control and the inclusion of adequate exceptions to restrictions on military action insure that military policy will remain flexible

There is, of course, a possibility that changed circumstances will force a reconsideration of the wisdom of certain specific limitations. But the assertion of congressional control by enacting the proposed restrictions merely shifts from the President to Congress power over future military involvement in Indochina. The President would retain the power to engage in immediate self-defense under the executive power to repel sudden attacks. In addition, exceptions to the restrictions of the McGovern-Hatfield-Hughes-Goodell proposal permit full executive freedom to protect our troops and prisoners during withdrawal.⁷⁵ *But major decisions would be reserved for Congress, which is fully capable of making major decisions quickly and competently. And by asserting its proper role in decisions of war-making, Congress would act to re-establish the traditional constitutional balance.*

VII. CONCLUSION

The current freedom enjoyed by the executive to engage in barely constitutional military action is largely the result of inaction by Congresses past. As Supreme Court Justice Jackson stated:

We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.⁷⁶

THE CONSTITUTION OF THE UNITED STATES

(Clauses Related to War)

ARTICLE I

Section 1.—All legislative power herein granted shall be vested in a Congress of the United States * * *

Section 8.—The Congress shall have Power to lay and collect Taxes, Duties, Imposts, and Excises, to * * * provide for the common Defence * * *

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant letters of Marque and Reprisal, and make rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of money to that Use shall be for a longer term than Two years;

To provide and maintain a Navy;

To make rules for the Government and Regulation of the land and naval Forces;

⁷⁵ Exceptions broader than these are not required by the Constitution, since the Congress could authorize at any time military action beyond immediate self-defense.

⁷⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952).

To provide for calling forth the Militia * * *

To provide for organizing, arming, and disciplining the Militia * * *

To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *

ARTICLE II

Section 1.—The executive Power shall be vested in a President of the United States of America. * * *

Section 2.—The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States when called into the actual service of the United States; * * *

He shall have power, by and with the advice and consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors * * * and all other Officers of the United States * * *

(The Appropriations Clause)

ARTICLE I

Section 9.—No money shall be drawn from the Treasury, but in consequence of Appropriations made by law; * * *

THE DEBATE ON THE WAR POWER IN THE CONSTITUTIONAL CONVENTION

(From Madison's Notes—Friday Aug. 17 in convention)

"TO MAKE WAR"

Mr. Pinkney opposed the vesting this power in the Legislature. Its proceedings were too slow. It would meet but once a year. The House of Representatives would be too numerous for such deliberations. The Senate would be the best depository, being more acquainted with foreign affairs, and most capable of proper resolutions. If the States are equally represented in the Senate, so as to give no advantage to large States, the power will notwithstanding be safe, as the small have their all at stake in such cases as well as the large States. It would be singular for one authority to make war, and another peace.

Mr. BUTLER. The objections against the Legislature lie in great degree against the Senate. He was for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it.

Mr. Madison and Mr. Gerry moved to insert "declare," striking out "make" war; leaving to the Executive the power to repel sudden attacks.

Mr. Sharman thought it stood very well. The Executive should be able to repel and not to commence war. "Make" better than "declare" the latter narrowing the power too much.

Mr. Gerry never expected to hear in a republic a motion to empower the Executive alone to declare war.

Mr. ELLSWORTH. There is a material difference between the cases of making *war* and making *peace*. It should be more easy to get out of

war than into it. War also is a simple and overt declaration, peace attended with intricate and secret negotiations.

Mr. Mason was against giving the power of war to the Executive, because not safely to be trusted with it; or to the Senate, because not so constructed as to be entitled to it. He was for clogging rather than facilitating war; but for facilitating peace. He preferred "declare" to "make."

On the motion to insert *declare*—in place to *make*, it was agreed to.

New Hampshire, no; Massachusetts, absent; Connecticut, no (on the remark by Mr. King that "make" war might be understood to "conduct" it which was an Executive function, Mr. Ellsworth gave up his objection, and the vote of Connecticut was changed to-ay.); Pennsylvania, ay; Delaware, ay; Maryland, ay; Virginia, ay; North Carolina, ay; South Carolina, ay; Georgia, ay.

Mr. Pinkney's motion to strike out the whole clause, disagreed to without call of States.

COMMENTS ON THE ROLE OF CONGRESS AND THE PRESIDENT IN MILITARY AND FOREIGN AFFAIRS

James Madison

"The management of foreign relations appears to be the most susceptible of abuse of all the trusts committed to a government, because they can be concealed or disclosed in such parts and at such times as will best suit particular views; and because the body of the people are less capable of judging, and are more under the influence of prejudices, on that branch of their affairs, than of any other. Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad."—Letter to Jefferson, May 13, 1798.

Thomas Jefferson

"Considering that Congress alone is constitutionally invested with the power of changing our condition from peace to war, I have thought it my duty to await their authority for using force in any degree which could be avoided."—Message to Congress, December 6, 1805.

John Marshall

"The whole powers of war being, by the Constitution, vested in Congress, the acts of that body alone can be resorted to as our guides in this inquiry."—Opinion in *The Amelia*, 1801.

Justice Samuel P. Chase

"Congress is empowered to declare a general war, or Congress may wage a limited war; limited in place, in object, in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws."—Opinion in *Bas v. Tingey*, 1800.

Daniel Webster

"In the first place, I have to say that the war-making power in this Government rests entirely with Congress; and that the President can authorize belligerent operations only in the cases expressly provided for by the Constitution and the laws. By these no power is given to the Executive to oppose an attack by one independent nation on the posses-

sions of another. We are bound to regard both France and Hawaii as independent states, and equally independent, and though the general policy of the Government might lead it to take part with either in a controversy with the other, still, if this interference be an act of hostile force, it is not within the constitutional power of the President; and still less is it within the power of any subordinated agent of government, civil or military.”—Statement while Secretary of State, 1851.

James Buchanan

“The executive government of this country in its intercourse with foreign nations is limited to the employment of diplomacy alone. When this fails it can proceed no further. It cannot legitimately resort to force without the direct authority of Congress, except in resisting and repelling hostile attacks. It would have no authority to enter the territories of Nicaragua even to prevent the destruction of the transit and to protect the lives and property of our own citizens on their passage. It is true that on a sudden emergency of this character the President would direct any armed force in the vicinity to march to their relief, but in doing this he would act upon his own responsibility.”—Message to Congress, December 6, 1858.

Abraham Lincoln

“Let me first state what I understand to be your position. It is that if it shall become necessary to repel invasion, the President may, without violation of the Constitution, cross the line and invade the territory of another country, and that whether such necessity exists in any given case the President is the sole judge * * *

* * * Allow the President to invade a neighboring nation whenever he shall deem it necessary to repel an invasion, and you allow him to do so whenever he may choose to say he deems it necessary for such a purpose, and you allow him to make war at his pleasure. Study to see if you can fix any limit to his power in this respect, after having given him so much power as you propose * * *

The provision of the Constitution giving the war-making power to Congress was dictated, as I understand it, by the following reasons: Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no one man should hold the power of bringing oppression upon us. But your view destroys the whole matter, and places our President where kings have always stood.”—Letter to Herndon while in Congress.⁷⁷

⁷⁷ The following students at the Yale Law School have assisted in the preparation of this paper:

David Cooke.
Gary Fontana.
Frank Hamsher.
Gertrude Hamsher.
Christopher Lundin.
David Marks.
Jeffrey Orleans.
Randall Shepard.
Eric Stauffer.

Professor Charles L. Black, Henry Luce Professor of Jurisprudence at Yale Law School, has given us the benefit of his advice, and while he is in no way responsible for the contents of this paper, and may have reservations about certain points of law, he agrees generally with its conclusions.

We take full responsibility for the contents and conclusions of this paper.

REID L. FELDMAN.
HOWARD O. HUNTER III.
JOHN M. TOWNSEND.

STATEMENT BY JOHN R. STEVENSON, LEGAL ADVISER,
DEPARTMENT OF STATE, ON ISSUES OF INTERNATIONAL LAW INVOLVED IN UNITED STATES MILITARY ACTIONS IN CAMBODIA*

I welcome the opportunity to present the Administration's views on the questions of international law arising out of the current South Vietnamese and United States operations in Cambodia.¹

I do not intend to review in any detail the legal justification of earlier actions by the United States in Viet-Nam. In 1966 the previous Administration set forth at some length the legal justifications for our involvement in South Viet-Nam and our bombing of North Viet-Nam.² In general, reliance was placed squarely upon the inherent right of individual and collective self-defense, recognized by Article 51 of the U.N. Charter. This legal case involved the showing that North Viet-Nam had raised the level of its subversion and infiltration into South Viet-Nam to that of an "armed attack" in late 1964 when it first sent regular units of its armed forces into South Viet-Nam. The build-up of American forces in South Viet-Nam and the bombing of North Viet-Nam were justified as appropriate measures of collective self-defense against that armed attack.³

The legal case presented by the previous Administration was vigorously attacked and defended by various scholars of the international legal community.⁴ Many of the differences rested on disputed questions of fact which could not be proved conclusively. This Administration, however, has no desire to reargue those issues or the legality of those actions which are now history. In January 1969, President Nixon inherited a situation in which one-half million American troops were engaged in combat in South Viet-Nam, helping the Republic of Viet-Nam to defend itself against a continuing armed attack by North Viet-Nam. Our efforts have been to extricate ourselves from this situation by negotiated settlement if possible, or, if a settlement providing the South Vietnamese people the right of self-determination cannot be negotiated, then through the process of Viet-

*Before the Hammaraskjold Forum of the Association of the Bar of the City of New York, May 28, 1970.

¹ The views of the administration on the military and political issues have been expressed clearly by the President and other officials. See, in particular, President Nixon's address of Apr. 30, 1970, reprinted in State Department bulletin of May 18, and his press conference of May 8, reprinted in the New York Times on May 9. See also, Deputy Secretary of Defense Packard's address of May 15, 1970 in Fort Worth, Tex.

² Meeker, "The Legality of United States Participation in the Defense of Viet-Nam," Mar. 4, 1966, submitted to the Senate Committee on Foreign Relations on Mar. 8, and published in the State Department bulletin of Mar. 28, 1966.

³ They were also justified on that basis in U.S. reports to the United Nations, pursuant to art. 51. See the texts of the letters from Ambassador Stevenson to the Security Council, dated Feb. 7 and Feb. 27, 1965, reprinted in the Department of State bulletin, Feb. 22, 1965, p. 240, and Mar. 22, 1965, p. 419.

⁴ See the collection, in two volumes, *The Viet-Nam War and International Law*, edited by Richard A. Falk, and published in 1968 and 1969 by the American Society of International Law.

namization.⁵ The current actions in Cambodia should be viewed as part of the President's effort to withdraw United States forces from combat in Southeast Asia.⁶

I appreciate this opportunity to discuss the questions of international law arising out of our actions in Cambodia. It is important for the Government of the United States to explain the legal basis for its actions, not merely to pay proper respect to the law, but also because the precedent created by the use of armed forces in Cambodia by the United States can be affected significantly by our legal rationale. I am sure you recall the choice that was made during the Cuban missile crisis in 1962 to base our "quarantine" of Cuba not on self-defense since no "armed attack" had occurred, but on the special powers of the Organization of American States as a regional organization under Chapter 8 of the U.N. Charter.⁷ Within a narrower scope the arguments we make can affect the applicability of the Cambodian precedent to other situations in the future. I believe the United States has a strong interest in developing rules of international law that limit claimed rights to use armed force and encourage the peaceful resolution of disputes.

One way to have limited the effects of the Cambodian action would have been to obtain the advance, express request of the Government of Cambodia for our military actions on Cambodian territory. This might well have been possible.⁸ However, had we done so, we would have compromised the neutrality of the Cambodian Government and moved much closer to a situation in which the United States was committing its armed forces to help Cambodia defend itself against the North Vietnamese attack. We did not wish to see Cambodia become a co-belligerent along with South Viet-Nam and the United States. We are convinced that the interests of the United States, the Republic of Viet-Nam, and Cambodia, and indeed the interests of all Asian countries, will best be served by the maintenance of Cambodian neutrality, even though that neutrality may be only partially respected by North Viet-Nam.

As the President has made clear, the purpose of our armed forces in Cambodia is not to help defend the Government of Cambodia, but

⁵ The President reviewed our efforts at negotiation and the progress of Vietnamization in his statement of Apr. 20, 1970, published in State Department bulletin, May 11, 1970 and stated: "* * * our overriding objective is a political solution that reflects the will of the South Vietnamese people and allows them to determine their future without outside interference."

⁶ In his address of Apr. 30, announcing the use of force in Cambodia, President Nixon said: "We take this action not for the purpose of expanding the war into Cambodia but for the purpose of ending the war in Viet-Nam, and winning the just peace we all desire. We have made and will continue to make every possible effort to end this war through negotiation at the conference table rather than through more fighting in the battlefield."

⁷ See Chayes, "Law and the Quarantine of Cuba," 41 *Foreign Affairs* (1963) 550.

⁸ On May 1 a Cambodian spokesman said that "the Cambodian Government as a neutral government cannot approve foreign intervention." However, on May 5, Lon Nol issued the following statement: "In his message to the American people of April 30, 1970, President Nixon made known the important measures which he had taken to counter the military aggression of North Vietnam in Laos, Cambodia and South Vietnam. One of these measures concerns the aid of the U.S. in the defense of the neutrality of Cambodia violated by the North Vietnamese."

"The Government of Salvation notes with satisfaction the President of the United States took into consideration in his decision, the legitimate expressions of the Cambodian people who only desire to live in peace within their territory, independent, and in strict neutrality. For this reason, the Government of Cambodia (GOC) wishes to announce that it appreciates the views of President Nixon in his message of April 30 and expresses to him its gratitude."

"It is time now that the other friendly nations understand the extremely serious situation in which Cambodia finds itself and come to the assistance of the Cambodian people who are victims of armed aggression. The Government of Salvation renews on this occasion its appeal for assistance made April 14, noting that it will accept from friendly countries all unconditional and diplomatic, military and economic assistance."

Later statements have indicated even more clearly the Cambodian Government's approval of our actions.

rather to help defend South Viet-Nam and United States troops in South Viet-Nam from the continuing North Vietnamese armed attack.⁹ This limited purpose is consistent with the Nixon Doctrine, first set forth by the President at Guam on July 25, 1969,¹⁰ that the nations of the region have the primary responsibility of providing the manpower for their defense.

The North Vietnamese have continued to press their attack against South Viet-Nam since 1964 and have made increasing use of Cambodian territory in the furtherance of that attack. They have used Cambodia as a sanctuary for moving and storing supplies, for training, regroupment and rest of their troops and as a center of their command and communications network. I assume that these facts are generally accepted, but it might be useful to give a few examples.

In the past five years, 150,000 enemy troops have been infiltrated into South Viet-Nam through Cambodia. In 1969 alone, 60,000 of their military forces moved in from Cambodia. The trails inside Cambodia are used not only for the infiltration of troops but also for the movement of supplies. A significant quantity of the military supplies that support these forces came through Cambodian ports.

Since 1968 the enemy has been moving supplies through southern Cambodia to its forces in the Mekong Delta. Further, in the spring and summer of 1969, three to four regiments of regular North Vietnamese troops used Cambodian territory to infiltrate into the Mekong Delta. Up to that time, there had been no regular North Vietnamese combat units operating in this area.

As many as 40,000 North Vietnamese and Viet Cong troops were operating out of the Cambodian base areas against South Viet-Nam prior to April 30. As the war in South Viet-Nam intensified, Viet Cong and North Vietnamese troops have resorted more frequently to these sanctuaries and to attacking from them to avoid detection by or combat with United States and South Vietnamese forces.

During 1968 and 1969 the Cambodian bases adjacent to the South Vietnamese provinces of Tay Ninh, Pleiku, and Kontum have served as staging areas for regimental-size Communist forces for at least three series of major engagements—the 1968 Tet offensive, the May 1968 offensive and the post-Tet 1969 offensive.

Many of these North Vietnamese actions violate Cambodian neutrality. Flowing from the Fifth Hague Convention of 1907¹¹ are the generally accepted principles that a neutral may not allow belligerents to move troops or supplies across its territory, to maintain military installations on its territory, or to regroup forces on its territory. A neutral is obligated to take positive action to prevent such abuse of its neutrality either by attempting to expel the belligerent forces or to intern them.

Both the previous Cambodian Government under Prince Sihanouk and the present Government headed by Lon Nol have made efforts to limit, if not prevent, these violations of Cambodia's rights as a neutral.

⁹ This is to be distinguished from the furnishing of weapons and ammunition to Cambodia pursuant to the Foreign Assistance Act, 75 Stat. 424, 22 U.S.C. secs. 2161-2410, which is done to improve the ability of Cambodia to defend itself.

¹⁰ The President's statements were not for direct quotation, but the New York Times of July 26, 1969, contains a fair summary of his remarks. The President later clarified the doctrine in his address to the Nation on Viet-Nam of Nov. 3, 1969 and in his Report to the Congress dated Feb. 18, 1970, on U.S. foreign policy for the 1970's.

¹¹ I. Evans, "Treaties and Other International Agreements of the United States of America" (1968) 654.

While the Sihanouk Government did not, in our judgment, do all that, under international law, it should have done, it unquestionably made some efforts. As a legal matter it is clear that a neutral must take active measures commensurate with its power to protect its territory from abuse by a belligerent. It is likewise clear that a neutral's "duty of prevention is not absolute, but according to his power."¹² In any event, however, the control and restraint exercised by the previous Cambodian Government was progressively eroded by constant North Vietnamese pressure. Prior to the ouster of Prince Sihanouk regular supply of arms and munitions through the Port of Sihanoukville had become an established fact.

After the change of government on March 18, in which the United States was not involved in any respect, Cambodian police and other officials were driven out of many localities in the border area. When it became apparent to North Viet-Nam that the new Cambodian Government was not willing to permit the same wide scope of unneutral use of its territory by North Vietnamese forces as the previous government, the decision was evidently taken to expel all Cambodian Government presence from the border areas and move militarily against the Cambodian army, with a view to linking up all the sanctuaries and the Port of Sihanoukville. This would have produced a unified and protected sanctuary from the Gulf of Siam along the entire border of South Viet-Nam to Laos, with virtually unrestricted movement and unlimited supply access. The threat posed by such a situation of renewed and increased attacks against United States and Vietnamese troops in South Viet-Nam is obvious. We also knew that enemy forces were instructed to emphasize attacks on U.S. forces and increase U.S. casualties.

That is the rapidly developing situation the President faced at the time of his April 30 decision to make limited military incursions into the sanctuaries in Cambodia, which had been militarily occupied by North Viet-Nam. It was impossible for the Cambodian Government to take action itself to prevent these violations of its neutral rights. Its efforts to do so had led to the expulsion of its forces. In these circumstances, the question arises of what are the rights of those who suffer from these violations of Cambodian neutrality.

It is the view of some scholars that when the traditional diplomatic remedy of a claim for compensation would not adequately compensate a belligerent injured by a neutral's failure to prevent illegal use of its territory by another belligerent, the injured belligerent has the right of self-help to prevent the hostile use of the neutral's territory to its prejudice.¹³ Professor Castrén, the distinguished Finnish member of the International Law Commission has stated that "If, however, a neutral State has neither the desire nor the power to interfere and the situation is serious, other belligerents may resort to self-help."^{13a}

¹² As the Harvard Research in International Law pointed out in its 1939 Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, "A neutral State is not an insurer of the fulfillment of its neutral duties. It is obligated merely to 'use the means at its disposal' to secure the fulfillment of its duties." 33 *American Journal of International Law* (1939), suppl., p. 247.

¹³ According to Greenspan, *The Modern Law of Land Warfare* (1959) 538: "Should a violation of neutral territory occur through the complaisance of the neutral state, or because of its inability, through weakness or otherwise, to resist such violation, then a belligerent which is prejudiced by the violation is entitled to take measures to redress the situation, including, if necessary, attack on enemy forces in the neutral territory."

^{13a} Castrén, *The Present Law of War and Neutrality* (Helsinki, 1954) 442. See also II Guggenheim, *Traité de Droit International Public* (Geneva, 1954) p. 346.

The more conservative view is that a belligerent may take reasonable action against another belligerent violating the neutral's territory only when required to do so in self-defense.¹⁴

The United States Department of the Army Field Manual relating to the Law of Land Warfare states the following rule: "Should the neutral State be unable, or fail for any reason, to prevent violations of its neutrality by the troops of one belligerent entering or passing through its territory, the other belligerent may be justified in attacking the enemy forces on this territory."¹⁵ This rule can be traced to, among others, the decision of the Greco-German Mixed Arbitral Tribunal after the First World War which had to deal with the German bombardment of Salonika in Greece. During the war the Allied forces had occupied Salonika despite Greece's neutrality and the Germans responded with a bombardment. The Tribunal stated that Allied occupation constituted a violation of the neutrality of Greece, and that it was immaterial whether the Greek Government protested against that occupation or whether it expressly or tacitly consented to it. The Tribunal then concluded that "in either case the occupation of Salonika was, as regards Germany, an illicit act which authorized her to take, even on Greek territory, any acts of war necessary for her defense."¹⁶

When the British navy entered then neutral Norway's territorial waters in 1940 to liberate British prisoners on the *Altmark*, a German auxiliary vessel, a thorough analysis of that case by Professor Waldock led him to the conclusion that in some circumstances a breach of neutrality by one belligerent threatens the security of the other belligerent in such a way that nothing but the immediate cessation of the breach will suffice. "Accordingly"—he continues—"where material prejudice to a belligerent's interests will result from its continuance, the principle of self-preservation would appear fully to justify intervention in neutral waters."¹⁷

As far back as the 18th Century, Vattel had this to say:

On the other hand, it is certain that, if my neighbour offers a retreat to my enemies, when they have been defeated and are too weak to escape me, and allows them time to recover and to watch for an opportunity of making a fresh attack upon my territory . . . [this is] inconsistent with neutrality . . . [H]e should . . . not allow them to lie in wait to make a fresh attack upon me; otherwise he warrants me in pursuing them into his territory. This is what happens when Nations are not in a position to make their territory respected. It soon

¹⁴ II Oppenheim, *International Law* (7th ed. 1952) 698. This is true whether or not the neutral has met its obligations to use the means at its disposal to oppose belligerent use of its territory. Stone, *Legal Controls of International Conflict* (1954) says (p. 401): "One clear principle is that, the right of self-preservation apart, an aggrieved State is clearly not entitled to violate the neutral's territorial integrity, simply because his enemy has done so. Diplomatic representations and claim are the proper course." A Columbia Law Review Note concludes: "Military action within neutral territory may be justified as a measure of self-defense or as an appropriate response to the failure of a neutral state to prevent the use of its territory by belligerent forces. . . . It is suggested . . . that international law should permit and encourage primary reliance on self-defense as a justification." Note, "International Law and Military Operations against Insurgents on Neutral Territory," 68 Col. L. Rev. 1127 (1948). See also *Corfu Channel Case*, ICJ Reports 1949, 34-35 and 77.

¹⁵ FM 27-10 (July 1956) par. 520, p. 185. Similar provisions were contained in the U. S. *Rules of Land Warfare of 1940* (par. 366) and in the *British Manual of Military Law* (pa. 655). See Greenspan, *The Modern Law of Land Warfare* (1959) p. 538, n. 23.

¹⁶ *Cocca Brothers v. The German State*, 1927 translated in Briggs, *The Law of Nations: Cases, Documents and Notes* (1938) pp. 756-58.

¹⁷ Waldock, "The Release of the *Altmark's* Prisoners," 24 *British Year Book of International Law* (1947) p. 216, at 235-36. See also Tucker, *The Law of War and Neutrality at Sea* (Naval War College, International Law Studies, vol. XLX, 1955, p. 262).

becomes the seat of the war; armies march, camp, and fight in it, as in a country open to all comers.¹⁸

The United States itself has sometimes in the past found it necessary to take action on neutral territory in order to protect itself against hostile operations. Professor Hyde cites many such instances of which I would note General Jackson's incursion into Spanish West Florida in 1818 in order to check attacks by Seminole Indians on United States positions in Georgia; the action taken against adventurers occupying Amelia Island in 1817, when Spain was unable to exercise control over it; and the expedition against Francisco Villa in 1916, after his attacks on American territory which Mexico had been unable to prevent.¹⁹

I have summarized these precedents and the views of scholars and governments principally to show general recognition of the need to provide a lawful and effective remedy to a belligerent harmed by its enemy's violations of a neutral's rights. I would not suggest that those incidents and statements by themselves provide an adequate basis for analysis of the present state of the law. We all recognize that, whatever the merits of these views prior to 1945, the adoption of the United Nations Charter changed the situation by imposing new and important limitations on the use of armed force.²⁰ However, they are surely authority for the proposition that, assuming the Charter's standards are met, a belligerent may take action on a neutral's territory to prevent violation by another belligerent of the neutral's neutrality which the neutral cannot or will not prevent, providing such action is required in self-defense.

In general, under the Charter the use of armed force is prohibited except as authorized by the United Nations or by a regional organization within the scope of its competence under Chapter 8 of the Charter, or, where the Security Council has not acted, in individual or collective self-defense against an armed attack. It is this latter basis on which we rely for our actions against North Vietnamese armed forces and bases in Cambodia.

Since 1965 we and the Republic of Vietnam have been engaged in collective measures of self-defense against an armed attack from North Vietnam. Increasingly since that time the territory of Cambodia has been used by North Vietnam as a base of military operations to carry out that attack, and it long ago reached a level that would have justified us in taking appropriate measures of self-defense on the territory of Cambodia. However, except for scattered instances of returning fire across the border, we refrained until April from taking such action in Cambodia. The right was available to us, but we refrained from exercising it in the hope that Cambodia would be able to impose greater restraints on enemy use of its territory. However, in late April a new and more dangerous situation developed. It became apparent that North Vietnam was proceeding rapidly to remove all remaining restraints on its use of Cambodian territory to continue the armed attacks on South Vietnam and our armed forces there.

Prior to undertaking military action the United States explored to the fullest other means of peaceful settlement. We awaited the outcome of the Cambodian Government's efforts to negotiate with the North

¹⁸ 3 E. DeVattel, *Le Droit des Gens* (Ienwick transl. 1916) sec. 133, at 277. [Emphasis added.]

¹⁹ I Hyde, *International Law* (2d ed., 1945), pp. 240-44.

²⁰ In particular, article 2, par. 4 of the charter.

Vietnamese and the Viet Cong agreed limitations on the use by the latter of Cambodian territory—without success. We have continually tried in the Paris Talks to bring about serious negotiation of the issues involved in the war. Soundings in the Security Council indicated very little interest in taking up the North Vietnamese violations of Cambodian territorial integrity and neutrality. We welcomed the French proposal looking to the possibility of an international conference although not publicly for fear of discouraging Hanoi's participation. The Soviet Union, after initially indicating interest, backed away. We were particularly pleased with the calling of the Djakarta Conference of interested Asian states to deal with the Cambodian problem on a regional basis. The best long-run approach to East Asian security problems lies through cooperative actions such as this. In the short run, however, they cannot be expected to provide an adequate defense to the North Vietnamese military threat.

The United States has imposed severe limits on the activities of U.S. forces. They will remain in Cambodia only a limited time—not beyond July 1—in a limited area—not beyond 21 miles from the border—and with a limited purpose—to capture or destroy North Vietnamese supplies, to destroy base installations, and to disrupt communications. To the maximum extent possible, we have directed our forces at enemy base areas and have tried to avoid civilian population centers. We have limited our area of operations to that part of Cambodia from which Cambodian authority had been eliminated and which was occupied by the North Vietnamese.

The Cambodian Government and the Cambodian people are not the targets of our operations. During the period from 1967 to 1970 the Cambodian Government became increasingly outspoken in its opposition to the North Vietnamese occupation. In fact, Sihanouk's purpose in going to the Soviet Union and China when he was deposed was to solicit their help in persuading the North Vietnamese to get out of Cambodia. The Lon Nol Government has expressed its understanding of our actions.²¹

Our actions in Cambodia are appropriate measures of legitimate collective self-defense, and we have so reported to the United Nations, as required by Article 51 of the United Nations Charter.²²

²¹ See note 8 above.

²² S/9781 (May 5, 1970).

THE WAR IN SOUTHEAST ASIA: A LEGAL POSITION PAPER*

INTRODUCTION

We do not need less criticism in time of war, but more. It is to be hoped that the criticism will be constructive, but better unfair criticism than autocratic suppression.

—WOODROW WILSON.

This document is submitted in the spirit expressed above by President Wilson. It was prepared in the hope that its presentation might help effect a change in the foreign policy of the United States in Southeast Asia. It is in a way a dissenting opinion, a rebuttal to the official justifications which have been offered for President Nixon's recent action in Cambodia and for the larger United States involvement in Vietnam. At a time when irrationality and heightened emotionalism characterize the foreign policy debate on both sides, it is imperative that reasonable men make their voices heard.

As lawyers, our primary concern in the sections which follow shall be focused on the legal questions arising out of the United States actions in Southeast Asia. Though recognizing that many non-legal factors must be involved in the determination of foreign policy, we believe that the threshold questions must be legal in nature. This is particularly true in any society predicated on the rule of law where official actions, however wise, can be acceptable only if legally justifiable.

We recognize that any criticism of the Administration's foreign policy is always susceptible to the retort that those who criticize lack access to the numerous sources of information which the President has at his command. This argument, however, if pressed beyond its reasonable limits would totally isolate the President's policies from public debate. When accepted by members of Congress, it becomes particularly dangerous, as it inhibits the legislative branch from the unfettered exercise of its Constitutional responsibilities. As Congressman Abraham Lincoln observed about another president in another war:

Allow the President to invade a neighboring nation, whenever *he* shall deem it necessary to repel an invasion and you allow him to do so, *whenever he may choose to say* he deems it necessary for such purpose—and you allow him to make war at pleasure. Study to see if you can fix *any limit* to his power in this respect, after you have given him so much as your propose.¹

*Prepared under the auspices of the Root-Tilden scholarship program by students of the New York University School of Law, 1970.

¹ E. Corwin, *The President: Office and Powers* 451 (1964).

PART 1.—QUESTIONS UNDER DOMESTIC LAW

1. CHARACTERIZATION OF THE CONFLICT

The central argument of the subsections which follow is the assertion that the President may not act unilaterally to initiate or conduct a war. Indeed, Article I, Section 8 of the Constitution specifically provides that the power “to declare war” shall rest with Congress. The threshold question in this discussion must thus be whether the present Southeast Asian conflict amounts to a “war” in the constitutional sense, for if it does not its conduct may be well within the executive prerogative.

American courts have traditionally given a broad interpretation to the term “war.” The Supreme Court, in the *Prize Cases*,² held that a state of war exists whenever a nation prosecutes its rights by force. While it is doubtful that any modern court would restrict itself to so simple a definition, it is clear that when a given conflict reaches a certain level of intensity the constitutional requirement is satisfied. In 1953, in *United States v. Bancroft*,³ the Court of Military Appeals, in construing the term “war” as used in the Uniform Code of Military Justice, stated:

We believe a finding that this is a time of war . . . is compelled by the very nature of the conflict; the manner in which it is carried on; the movement to, and the presence of large numbers of American men and women on, the battlefields . . .; the casualties involved; the sacrifices required; the drafting of recruits to maintain the large number of persons in the military service . . .; and the tremendous sums being expended. . . .⁴

Application of these criteria to the Southeast Asian conflict reveals that it qualifies as a war. Since 1965, over 2,500,000 Americans have served in Southeast Asia. Present troop strength is reported at 427,000, however such strength has in the past been as great as 543,400. Of these, 41,733 have been killed, and 275,724 wounded—more casualties than the United States suffered in World War I. The cost of the war in terms of dollars while not as saddening is indeed telling. At the beginning of 1969, the Defense Department put the cost of the war at about \$28 billion per year. To this date the war has cost Americans \$104.5 billion.⁵ In 1968, over 50% of the nation’s entire airpower was committed to military activities in Vietnam.⁶ In addition, more bomb tonnage has been dropped in Southeast Asia than was dropped on America’s European enemies during World War II. These facts have led at least one member of the nation’s highest military tribunal to conclude that the Southeast Asian conflict is in fact a “war.”⁷

II. LIMITS ON THE PRESIDENT’S POWER AS COMMANDER-IN-CHIEF

Having determined that the Southeast Asian conflict is a “war” in the constitutional sense, it follows that the President’s power to initiate or conduct military activities is narrowly circumscribed. In

² 67 U.S. (2 Black) 635 (1863).

³ 3 U.S.C.M.A. 3, 11 C.M.R. 3 (1953).

⁴ *Id.* at 5.

⁵ These figures were supplied by the Department of Defense in a telephone conversation of May 11, 1970.

⁶ 114 Cong. Rec. 6490 (daily ed. 1968) (remarks of Senator Young).

⁷ *United States v. Anderson*, 17 U.S.C.M.A. 588, 594 38 C.M.R. 386 (1968) (Ferguson, J., concurring).

Youngstown Sheet & Tube Co. v. Sawyer,⁸ the Supreme Court in 1952 ruled that there are only two sources of presidential power—an express grant from the Constitution itself or a constitutionally valid act of Congress. The following paragraphs will demonstrate that the President lacks authority to conduct present military operations in Southeast Asia since the power “to declare war” is expressly entrusted to Congress and thereby removed from the presidential prerogative. Further, it will be shown that Congress has not exercised this power through a delegation to the President or otherwise.

A. President's Military Power under the Constitution

1. *Legislative History*.—Article II, Section 2 of the Constitution provides that “The President shall be Commander in Chief of the Army and Navy of the United States,” but the legislative history of the Commander-in-Chief clause indicates that the power so delegated to the President was quite limited in scope. The Constitution was written with the desire to avoid many of the evils of the monarchies of Europe. The framers were aware that while kings and princes made wars, it was the people who paid the price in money and their lives. Thus, by voice vote the Constitutional Convention refused a proposal to give the President the power to declare war, limiting his powers instead to those of Commander-in-Chief.⁹ These presidential powers were intended to be substantially less than those traditionally exercised by the English monarch. Though the king could declare war and raise and regulate armed forces, the Constitution reserved these powers in the new republic to Congress alone. The President's power as Commander-in-Chief was to amount to nothing more than the supreme command and direction of the military and naval forces as “first general and admiral of the confederacy.”¹⁰ The President was not to be vested with vast war powers which could be exercised arbitrarily and without check.

The “check” upon the President's authority was embodied in Article I, Section 8, which grants to Congress the power “to declare war.” The original draft of the Constitution conferred upon Congress the power to “make” war, but several delegates objected that this terminology might lead to an interpretation that the President might himself commence a war. To render such an interpretation impossible, the draft was amended substituting the word “declare.”¹¹

2. *Early Cases*.—The Supreme Court has upheld the limitations intended by the framers in the few cases that have dealt with the President's power as Commander-in-Chief. In *Little v. Barrem*,¹² the Court held that the President had exceeded his powers in ordering the Navy to seize ships coming from French ports, since Congress' consent to hostilities was limited to ships going to French ports. In *Fleming v. Page*,¹³ the Court, while not expressly deciding the point, nevertheless addressed itself to the scope of the President's war-making power. “His duty,” wrote the Court, “and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the

⁸ 343 U.S. 579 (1952).

⁹ J. Madison, Debates in the Federal Convention of 1787, 418–19 (G. Hunt and J. Scott eds. 1920).

¹⁰ The Federalist No. 69 (A. Hamilton).

¹¹ 2 J. Madison, Journal of the Federal Convention 548 (Scott ed. 1893); 2 M. Farrand, The Records of the Federal Convention, 313, 318–19 (1911).

¹² 6 U.S. (2 Cranch) 170 (1804).

¹³ 50 U.S. (9 How.) 602 (1850).

naval and military forces placed by law at his command * * *.”¹⁴ In *Ex Parte Milligan*,¹⁵ the Court held that the President’s military power to establish military courts of general jurisdiction could not be exercised in areas where constitutionally established courts were in operation. In a concurring opinion, Mr. Chief Justice Chase made the following observation pertaining to the division of military powers between the executive and legislative branches:

Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and conduct of campaigns. That power and duty belong to the President as commander-in-chief.¹⁶

From the statement of the Chief Justice, one can clearly infer that neither branch may interfere with powers expressly granted to the other. Thus, the President, as Commander-in-Chief, may not interfere with the powers of Congress to raise, support and govern the armed forces or to declare war.

3. *History of Executive Actions*.—The legislative history and cases discussed above appear to support the conclusion that the President may not unilaterally initiate and conduct a war. Indeed, were it not for numerous instances of the President’s unilaterally taking military action, there would be little question of his inability to do so. In 1966, however, the Department of State sought, in part, to justify American involvement in Southeast Asia by citing 125 “similar” actions in which the President had ordered troops into action or position without obtaining prior congressional authorization.¹⁷ A closer examination of these instances, however, reveals the dangerously misleading nature of the Department’s assertion.

The early history of congressional involvement in military affairs demonstrates that Congress in no sense abdicated its constitutional responsibilities. In the so-called “undeclared war” with France (1798–1800), President Adams felt the need for congressional authorization to wage what amounted to only a limited war.¹⁸ A unanimous Supreme Court affirmed the congressional role in *Bas v. Tingey*,¹⁹ where Justice Chase stated, “Congress is empowered to declare a general war, or Congress may wage a limited war; limited in place, in object, in time.”²⁰

When President Jefferson took action against the Tripolitan pirates in December, 1801, he instructed the Navy to protect Americans but nevertheless restrained the U.S. forces from any but defensive actions without congressional approval.²¹ In December, 1801, Jefferson went to Congress requesting authority to take offensive measures, which was ultimately granted.²²

In December, 1805, Jefferson, fearing Spain might violate the Louisiana border, asked Congress for authority to use appropriate protective force. The Congress thought it unwise, however, and demurred.²³

¹⁴ *Id.* at 614.

¹⁵ 71 U.S. (4 Wall.) 2 (1866).

¹⁶ *Id.* at 139.

¹⁷ Department of State, Office of the Legal Adviser, *Legality of the United States Participation in the Defense of Vietnam*, 75 Yale L.J. 1085, 1101 (1966).

¹⁸ M. Pusey, *The Way We Go to War* 62 (1969).

¹⁹ 4 U.S. (4 Dall.) 36 (1800).

²⁰ *Id.* at 43.

²¹ 1 T. Jefferson, *A Compilation of the Messages and Papers of the Presidents* 327 (J. Richardson ed. 1896).

²² *Id.*

²³ *Id.* at 389–90.

Even the Monroe Administration, which in 1823 boldly announced a forceful United States foreign policy, showed deference to the constitutional authority of the Congress. Secretary of State John Quincy Adams informed the Colombian ambassador that in reference to the use of military force under the Monroe Doctrine, "by the Constitution of the United States, the ultimate decision of this question belongs to the Legislative Department of the Government."²⁴

While there are several instances of the President's sending U.S. forces abroad, at no time during these early years did the President wage a war, limited or otherwise, without the full consent of Congress. In the nineteenth century there were some apparent deviations from the policy of congressional participation in military affairs but in each case Congress vigorously asserted its prerogative. In May, 1846, President Polk unilaterally undertook military operations against Mexico in response to what was arguably an invasion of United States territory. On January 3, 1948, the House of Representatives declared that the war was "unnecessarily and unconstitutionally begun by the President of the United States."²⁵ The Congress was similarly outspoken eight years later when President Pierce authorized United States shelling of Greytown, Nicaragua.²⁶ At the beginning of the twentieth century the President again acknowledged congressional authority by seeking legislative authorization for military actions against Spain.²⁷ The pattern of the formative years of the nation's history is clear—all three branches of government recognized Congress' sole authority to initiate and conduct war.

In recent years the President has acted more independently than before in commencing military actions, but the constitutional import of these unilateral uses of force remains unclear. In the first place, of the numerous instances cited by the Department of State, it is uncertain how many qualified as "wars" in the constitutional sense. Secondly, assuming *arguendo* that a sufficient number so qualified, it is by no means clear that such exercises of executive prerogative can operate to expand the presidential powers granted by the Constitution.

The *only* conflict of this century, arguably instituted by unilateral presidential action, which rivals the present Southeast Asian situation in terms of duration, costs, and troop commitment is the Korean Conflict. The Korean "police action," which lasted for some three years, ultimately proved to be the fourth largest war in the nation's history, costing some 30,000 lives and scores of billions of dollars.²⁷ Moreover, some members of Congress, regarding the conflict as a "war," had grave doubts as to its constitutional propriety. Senator Robert S. Taft of Ohio, for example, stated that by sending American forces to Korea at his own discretion and without legislative authorization, the President has "usurped power and violated the Constitution and laws of the United States."²⁸

Some constitutional theorists have argued that a history of unchallenged executive practices can put a "gloss" on the Constitution—i.e., that a history of congressional acquiescence in the exercise of a power by the President may create the authority for that exercise

²⁴ The Record of American Diplomacy 185 (R. Bartlett ed. 156).

²⁵ E. McCormac, James K. Polk—A Political Biography 530 (1922).

²⁶ F. Wormuth, The Vietnam War: The President Versus the Constitution 24 (1968).

²⁷ A. Kelly & W. Harbison, The American Constitution 358 (3d ed. 1963).

²⁸ Id.

where it does not otherwise exist under the Constitution. The Supreme Court adopted this position in *United States v. Midwest Oil Co.*²⁹ The Court ruled that the long-continued practice of the President, with the tacit acquiescence of Congress, of withdrawing certain public lands that would otherwise have been open to private acquisition, operated as a grant of implied power to the President to continue such withdrawals.

As the *Midwest* Court made clear, the finding of such implied power depended on the existence of a long-continued executive practice coupled with congressional acquiescence. As previously observed, the proposition that the President acting unilaterally can take this country to "war" in the constitutional sense can be justified if at all, only on the basis of the Korean precedent, an argument which scarcely demonstrates a long-continued executive practice.

Further, the Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer*³⁰ has virtually abandoned the *Midwest* holding. Ruling that President Truman's seizure of a steel mill without congressional authority could not be justified by virtue of the fact that previous presidents had acted similarly, the Court observed:

It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution "in the Government of the United States, or any Department or Officer thereof."³¹

The Court's holding seems eminently reasonable, for otherwise we are left in the absurd position of affirming the proposition that the President can increase his power by means themselves unconstitutional.

Assuming that any life remains in the *Midwest* holding, neither that case nor any other Supreme Court case has ever held that an implied grant of power to the President may be found as a result of congressional acquiescence in the exercise of a presidential power expressly granted to Congress by the Constitution. Thus, it is doubtful that even the rationale of the *Midwest* case could be applied to executive exercise of Congress' war power.

4. *President's Power to Repel Attack.*—The Government has argued, quite correctly, that the power of the President as Commander-in-Chief includes the power to engage in hostilities, without congressional authorization, in order to repel armed attack against the country. At the Constitutional Convention, the wording of the provision granting Congress the power to "make" war was changed allowing Congress to "declare" war instead. The reason for the change was, *inter alia*, to permit the President to defend against attacks on his own initiative, as Congress might be slow to meet such an emergency.³² This exception to the exclusivity of Congress' power to declare was is, however, narrowly circumscribed.

As previously observed, in granting the power to initiate war solely to Congress, it was the framers' intention that a decision of such gravity should be made only by the representatives of the people. The emergency power of the President to repel attack must be construed in light

²⁹ 236 U.S. 459 (1915).

³⁰ 343 U.S. 579 (1952).

³¹ *Id.* at 588-89.

³² See note 11 *supra*.

of this primary intent. While it is perfectly natural that the President was granted sufficient powers to protect the nation from irreparable harm in situations where the Congress could not be convened, that power must be viewed as temporary only. This was clearly the understanding of James Madison who asserted that Congress retained most of the war power allowing the President only to repel attacks but not to commence war.³³

Early presidential actions support Madison's interpretation. In 1801, President Jefferson, though directing the Navy to take defensive measures against Tripolitan pirates, sought and received a congressional grant of authority before authorizing offensive actions.³⁴ In 1805, Jefferson, fearing an attack by Spain across the Louisiana border, asked Congress for authority to use appropriate protective force. Although his request was denied the fact that Jefferson felt constrained to seek congressional authorization indicates the narrowness with which he construed his "defensive" powers.³⁵

B. President's Military Powers under Congressional Authority

From the above discussion it is apparent that the President derives no authority from the Constitution unilaterally to initiate a war. Such power is vested only in Congress. The question remains, however, whether Congress may to any extent or under any circumstances delegate its exclusive military power to the Chief Executive.

In *Panama Refining Co. v. Ryan*,³⁶ the Supreme Court ruled that Congress may delegate certain of its powers to selected agents. In *Schechter Poultry Corp. v. United States*,³⁷ however, the Court ruled that any such delegation must be sufficiently specific as to the nature and scope of the powers authorized and as to the circumstances in which they may be exercised.

In the previous two sections we have discussed the general legal principles governing the relationships of the President and the Congress with respect to exercise of the war powers. Applying these principles, we now turn to an examination of the Cambodian incursion and the Vietnam war.

III. THE CAMBODIAN INCURSION

In all good faith, we can discern no possible legal justification for the President's actions in Cambodia. Many arguments have been advanced in favor of the legality of American operations in Vietnam. While we find none of these persuasive (as shall be demonstrated below), they are at least arguable. One searches the record in vain, however, for any evidence which supports the constitutionality of the President's actions in Cambodia.

The President, in his speech of April 30, 1970, offered at most one justification for unilaterally ordering the incursion into Cambodia—his power as Commander-in-Chief.³⁸ As discussed in previous sections, the President has no power as Commander-in-Chief to initiate or conduct a war save in the case of an armed attack. The question thus

³³ J. Madison, *supra* note 9, at 418-19.

³⁴ See note 21 *supra*.

³⁵ See note 23 *supra*.

³⁶ 293 U.S. 388 (1935).

³⁷ 295 U.S. 495 (1935).

³⁸ Address by President Nixon, Apr. 30, 1970, reprinted in *New York Times*, May 1, 1970, at 2, col. 1.

arises whether the President's actions in Cambodia were in response to an armed attack. This question and its international ramifications will be discussed more fully later in this document.³⁹ Suffice it to say for present purposes that since no military forces were deployed from Cambodian sanctuaries against troops of either the United States or South Vietnam in a manner to make executive action imperative without congressional consultation, the narrow constitutional requirements for unilateral presidential action were not satisfied.⁴⁰

Since the President had no power to initiate the Cambodian operation unilaterally, his actions can be justified constitutionally only if undertaken pursuant to congressional authorization. We are unable to find such a legislative grant, nor has the Government to date suggested one. None of the legal arguments, however weak, advanced to show congressional authorization for United States presence in Vietnam can be made with regard to our involvement in Cambodia. For example, the Gulf of Tonkin Resolution⁴¹ in its broadest interpretation cannot be stretched to authorize the present incursion. Even assuming *arguendo* that the resolution authorizes the American presence in Vietnam, section 2 seems to limit our assistance to members or protocol states of the Southeast Asia Collective Defense Treaty, a category that does not include Cambodia. Likewise, Congress has neither appropriated funds for military activities in Cambodia nor specifically authorized troop commitments there. Indeed, the evidence suggests that the only congressional consideration of possible Cambodia activities resulted in opposition to such a commitment by the Senate Foreign Relations Committee.⁴²

In view of these conclusions, it is most disturbing that the President, being the officer of government expressly entrusted with the responsibility to see that the laws of the land are faithfully enforced, should so blatantly ignore his constitutional responsibilities. Such action can only serve to undermine confidence in the President and to exacerbate the growing disrespect for law throughout the country.

IV. THE VIETNAM WAR

We need not here repeat the arguments made earlier in this document establishing that the present conflict in Vietnam qualifies as a "war" in the constitutional sense.⁴³ Nor need we remake the arguments relative to the consequences resulting from such a characterization—viz., that the President lacks constitutional power to initiate or conduct a war without congressional authorization except in an emergency situation in response to an armed attack.⁴⁴

³⁹ See pt. II *infra*.

⁴⁰ See text accompanying notes 32–35 *supra*.

⁴¹ 78 Stat. 384 (1964).

⁴² See New York Times, Apr. 28, 1970, at 1, col. 8. It is also appropriate to note that on June 25, 1969, the Senate by a vote of 70–16 passed the so-called "National Commitments Resolution," S. Res. 85, 91st Cong., first sess. (1969). The resolution was generally hailed as a congressional attempt to reassert its voice in decisions committing United States forces for use in foreign territories. It provided:

"Whereas accurate definition of the term 'national commitment' in recent years has become obscured: Now, therefore, be it

Resolved, That it is the sense of the Senate that a national commitment by the United States to a foreign power necessarily and exclusively results from affirmative action taken by the executive and legislative branches of the United States Government through means of a treaty, convention, or other legislative instrumentality specifically intended to give effect to such a commitment."

⁴³ See sec. I of this part *supra*.

⁴⁴ See sec. II of this part *supra*.

Even conceding that the President's initial exercise of military power in Vietnam might have qualified as an emergency action, we have seen that the authority created under such exception expires when it is first possible to place the matter before Congress.⁴⁵ The President himself tacitly acknowledged this limitation in seeking the Gulf of Tonkin Resolution from Congress in August, 1964. It thus being impossible to justify our military actions in Vietnam under the "armed attack exception," the sole remaining question is whether Congress itself has authorized such actions in any constitutionally permissible manner.

A. Gulf of Tonkin Resolution

The Executive Branch has repeatedly claimed that the Gulf of Tonkin Resolution⁴⁶ constitutes congressional authorization for the extensive military operations in Vietnam. Indeed, Under Secretary of State Katzenbach went so far as to call the resolution the "functional equivalent" of a congressional declaration of war.⁴⁷ An examination of the legislative history of the resolution, however, does not support this conclusion.

Statements made on the floor of Congress and in hearings before congressional committees indicate the limited nature of legislative intent with respect to the resolution. Senator Fulbright, one of the sponsors, indicated that the purpose of the resolution was "to prevent the spread of war, rather than to spread it."⁴⁸ Further, the message from President Johnson in support of the congressional authorization stated in part, "As I have repeatedly made clear, the United States intends no rashness and seeks no wider war."⁴⁹ The Executive Branch also promised that Congress would not be ignored after enactment of the resolution. Secretary of State Rusk declared, "Therefore if the Southeast Asia situation develops . . . there will continue to be close and continuous consultation between the President and Congress."⁵⁰

In light of all the circumstances, it is evident that members of neither house intended the resolution to allow the President to engage in an Asian land war. Senator Brewster observing, during the Senate debates, that he "would look with dismay on the landing of large armies on the continent of Asia," asked Senator Fulbright if the resolution would approve "the landing of large American armies in Vietnam or China."⁵¹ Senator Fulbright replied, "There is nothing in the Resolution, as I read it, that contemplates it. I agree with the Senator that that is the last thing we would want to do."⁵² On the House side, Representative Thomas Morgan, Chairman of the House Committee on Foreign Affairs, stated unequivocally, "The Resolution is definitely not an advance declaration of war. The committee has been assured by the Secretary of State that the constitutional power of Congress in this respect will continue to be scrupulously observed."⁵³

⁴⁵ See sec. II (A) (4) of this part *supra*.

⁴⁶ 78 Stat. 384 (1964).

⁴⁷ Statement of Nicholas D. Katzenbach, Senate Committee on Foreign Relations, U.S. Commitments to Foreign Powers, S. Rept. No. 797, 90th Cong., first sess. 82 (1967) [hereafter national commitments hearing].

⁴⁸ 110 Cong. Rec. 18,462 (remarks of Senator Fulbright).

⁴⁹ 110 Cong. Rec. 18,132 (1964) (message from the President of the United States).

⁵⁰ Statement of Secretary of State Dean Rusk, joint hearing on Southeast Asia resolution before the Senate Committee on Foreign Relations and the Senate Committee on Armed Services, 88th Cong., second sess. 4 (1964).

⁵¹ 110 Cong. Rec. 18,403 (1964) (remarks of Senator Brewster).

⁵² *Id.* (remarks of Senator Fulbright).

⁵³ 100 Cong. Rec. 18,539 (1964) (remarks of Representative Morgan).

The legislative history thus demonstrates beyond doubt that in passing the Gulf of Tonkin Resolution, Congress did not intend to declare war or to authorize the sustained large-scale hostilities which have resulted.

B. Ratification by Appropriation of Funds or by Congressional Inaction

Proponents of the Administration's position have argued that by appropriating funds to support the military in Vietnam, Congress has thereby authorized our participation in the war. This argument, however, cannot stand under close scrutiny.

Whether a Congressman agrees or disagrees with the policy of the President in Southeast Asia, he can neither morally nor politically deny weapons, shelter, and food to American soldiers facing daily attack. Congress is forced to appropriate money to keep American soldiers alive, even if their lives are endangered solely as a result of executive usurpation of Congress' power to declare war. This fact has been recognized both by those who have supported the President's policy and by those who have opposed it. Senators Richard Russell,⁵⁴ Sam Ervin,⁵⁵ Joseph Clark,⁵⁶ Peter Dominick,⁵⁷ Bourke Hickenlooper,⁵⁸ and Representative Paul Findley⁵⁹ have all recognized that Congress had no choice but to protect the lives of soldiers already in the field. In addition, before passing a Vietnam appropriations bill in March, 1966, numerous Congressmen and Senators indicated that their votes were not to be interpreted as authorizing large-scale military escalation.⁶⁰

Ratification by appropriation is also constitutionally impermissible for another reason. In *Greene v. McElroy*,⁶¹ the Supreme Court, in 1959, stated that where executive action is of dubious constitutionality, it is not sufficient to argue that Congress has impliedly ratified the action by appropriating money. Explicit ratification is necessary to insure: careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.⁶²

Thus, appropriation of funds to keep American soldiers alive constitutes neither congressional approval of the President's policy nor, even if such approval were intended, the necessary explicit ratification of the President's actions required by the Constitution.⁶³

The above principles apply with even greater force to the argument that ratification of presidential actions in Vietnam may be implied from congressional acquiescence. Since the Supreme Court has held that ratification cannot be implied from the affirmative act of appropriation, *a fortiori*, congressional inaction cannot be construed as constituting the necessary ratification. The decision of the Supreme

⁵⁴ 112 Cong. Rec. 4370, 4372 (1966).

⁵⁵ National commitments hearing, *supra* note 47, at 219-20.

⁵⁶ 112 Cong. Rec. 4382 (1966).

⁵⁷ National commitments hearing, *supra* note 47, at 246.

⁵⁸ *Id.* at 219, 248.

⁵⁹ *Id.* at 235.

⁶⁰ New York Times, Mar. 1, 1966, at 1, col. 7.

⁶¹ 360 U.S. 474 (1959).

⁶² *Id.* at 507.

⁶³ See notes 36 and 37 *supra* and accompanying text.

Court in *Youngstown Sheet & Tube Co. v. Sawyer*⁶⁴ supports this conclusion. Holding that presidential seizure of a steel mill could not be justified on grounds that previous Chief Executives had taken similar actions without congressional approval, the Court concluded that the failure of Congress to disapprove the former exercises of presidential power in no way reduced Congress' "exclusive constitutional authority" in the field.

PART 2—QUESTIONS UNDER INTERNATIONAL LAW

I. CAMBODIA

A. *Collective Self-Defense under the United Nations Charter*

1. *Definition of "Armed Attack."*—Under international law, the legal justification for the incursion of United States forces into Cambodia was presented in a letter of May 5, 1970, from the Permanent Representative of the United States to the United Nations, Ambassador Charles Yost, to the President of the Security Council.⁶⁵ The letter states that the United States action in Cambodia was taken as a measure of "collective self-defense."⁶⁶ In essence, this same justification has been employed to explain all United States military actions in Vietnam. It forms the foundation of the March, 1966, Department of State Memorandum on the legality of United States participation in the defense of Vietnam.⁶⁷

It is important, then, to consider the meaning of the concept of "collective self-defense" as embodied in Article 51 of the United Nations Charter.⁶⁸ Article 51 constitutes an exception to the basic Article 2(4) obligation of members of the United Nations to "refrain in their international relations from the threat or use of forces." It states in part: "nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations until the Security Council has taken the measures necessary to maintain international peace and security."

Military action taken in "self-defense" which does not satisfy the Article 51 exception results in a *prima facie* violation of the obligations assumed under the Charter. The invocation of self-defense as the justification for the use of force depends on the satisfaction of two preconditions.⁶⁹ The threshold question is whether an "armed attack" occurred. The following argument demonstrates that no credible claim of actual, physical armed attack on allied forces in Vietnam was asserted; and that, assuming *arguendo* that the threat of an armed attack would qualify as an "armed attack" under Article 51, the military movements of North Vietnamese troops in Cambodia merely raised the possibility of an attack, a possibility so remote in time and so contingent on fortune as to fall outside the meaning of a "threat of armed attack."⁷⁰

⁶⁴ 343 U.S. 579 (1952). See text accompanying note 30 and 31 *supra*.

⁶⁵ U.N. Doc. S/9781 (1970) [hereafter Yost letter].

⁶⁶ *Id.* at 1.

⁶⁷ Department of State (Legal Adviser), *The Legality of the United States Participation in the Defense of Viet-Nam*, Mar. 4, 1966, 54 Department of State bulletin 474 (1966), 112 Cong. Rec. (1966), 60 Am. J. Int'l L. 565 (1966) [hereafter memorandum].

⁶⁸ U.N. charter art. 51.

⁶⁹ Falk, *International Law and the United States Role in the Viet Nam War*, 75 Yale L.J. 1122, 1135-36, 1143 (1966).

⁷⁰ *Id.* at 1135-36.

President Nixon described that attack in his televised address to the Nation on April 30, 1970, as follows:

"North Vietnam in the last two weeks has stripped away all pretence of respecting the sovereignty or neutrality of Cambodia. Thousands of their soldiers are invading the country from *the sanctuaries*. They are encircling the capital of Phnom Penh. Coming from these sanctuaries as you see here, they had moved into Cambodia and are encircling the capital.

* * * [I]f this enemy effort succeeds, Cambodia would become a vast enemy staging area and a springboard for attacks on South Vietnam along 600 miles of frontier: a refuse where enemy troops could return from combat without fear of retaliation."⁷¹

Apparently, the attack to which the President referred was the increasingly intensive strife between Cambodian and North Vietnamese forces. The joint United States—South Vietnamese response involved an attempt to prevent a defeat of the Government in Phnom Penh. The President confirmed this view in a later portion of his speech:

"But the aid we will provide will be limited *for the purpose of enabling Cambodia to defend its neutrality* and not for the purpose of making it an active belligerent on one side or the other."⁷²

Ambassador Yost's letter to the President of the Security Council refers to base areas maintained for five years by the North Vietnamese in Cambodia for purposes of conducting military operations against South Vietnam.⁷³ The letter identifies the developments which triggered United States action as the expansion by the North Vietnamese of the perimeters of the base areas, the expulsion of any remaining Cambodian presence in those areas, the linking of the base areas into a continuous chain along the South Vietnamese border, and the extension of the bases deeper into Cambodian territory.⁷⁴ The letter asserts that North Vietnamese forces were massing in those areas in preparation for attacks against South Vietnam.⁷⁵

When the United Nations Charter was originally drafted an "armed attack" was generally understood as action(s) through which a state sought the initiative by the violent exercise of physical power.⁷⁶ Since then, some have argued for an expanded concept to include a military process rather than a single, hostile, offensive event.⁷⁷ The Department of State's 1966 Memorandum espoused this broadened concept. Specifically, the Memorandum argues that the concept of an "armed attack" included the processes of externally supported subversion, clandestine provision of arms, infiltration of armed personnel, and introduction of regular units of the North Vietnamese Army into South Vietnam.⁷⁸ Assuming *arguendo* that the Memorandum's much criticized⁷⁹ position is valid, Ambassador Yost's letter to the Security Council in justification of the Cambodian incursion further broadens the concept of "armed attack."

⁷¹ New York Times, May 1, 1970, at 2, col. 2 (city ed.) (Emphasis added.)

⁷² Id. at col. 3. [Emphasis added.]

⁷³ Yost Letter, *supra* note 65, at 1.

⁷⁴ Id.

⁷⁵ Id.

⁷⁶ Alford, *The Legality of American Military Involvement in Viet Nam: A Broader Perspective*, 75 Yale L.J. 1109, 114 (1966).

⁷⁷ Id. at 1113.

⁷⁸ Memorandum, *supra* note 67.

⁷⁹ See Falk, *supra* note 69, at 1123, n. 6, Wright, *Legal aspects of the Viet Nam Situation*, 60 Am. J. Int'l L. 750, 765-67 (1966).

In effect, the Yost letter⁸⁰ defines an "armed attack" in two extremely expansive senses. First, it views the enlargement and extension of military staging areas as falling within the concept of an "armed attack." In light of reports from Southeast Asia and the President's address indicating that the movement of the North Vietnamese forces in Cambodia had the apparent objective of isolating or overthrowing the Government in Phnom Penh,⁸¹ the current American military response appears designed to minimize the threat to the existence of the Cambodian Government. Certainly the use of all of Cambodia as a base of operations against Vietnam would increase the strength and flexibility of North Vietnamese operations. However, it strains both language and credulity to consider the enlargement of a base of operations an "armed attack." More plausibly, North Vietnamese activity in Cambodia constituted an effort to facilitate the threat of an "armed attack." This is the second sense in which the Yost letter expands the concepts. For the threat foreseen is sufficiently distant in time as to render meaningless any attempt to equate the "threat of armed attack" with an "armed attack" as defined under Article 51. The following answer by President Nixon to a reporter's question at the President's press conference indicates the time at which the Administration considered the threat would materialize:

Q. On April 20, you said Vietnamization was going so well that you could pull 150,000 American troops out of Vietnam. Then you turned around only 10 days later and said that Vietnamization was so badly threatened you were sending troops into Cambodia. Would you explain this apparent contradiction to us?

A. Well, I explained it in my speech of April 20, as you will recall, because then I said that Vietnamization was going so well that we could bring 150,000 out by the spring of the next year, regardless of the progress in the Paris talks and the other criteria that I had mentioned.

But I also had warned at that time that increased enemy action in Laos, in Cambodia, as well as in Vietnam was something that we had noted and that *if I had indicated and if I found that that increased enemy action would jeopardize the remaining forces who would be in Vietnam after we had withdrawn 150,000. I would take strong action to deal with it.*

*I found that the action that the enemy had taken in Cambodia would leave the 240,000 Americans who would be there a year from now without many combat troops to help defend them would leave them in an untenable position. That's why I had to act.*⁸²

Apparently, the United States crossed an international boundary and employed armed force in response to a threat which, by its own admission, would not materialize for at least one year. Attempting to justify preemptive actions exclusively in terms of an incipient threat does violence to the clear meaning of Article 51. Furthermore, such an overly broad definition of what constitutes an armed attack eliminates the distinction between the concepts of armed attack and self-defense. A defensive measure taken in anticipation of an attack can be interpreted by the country or force under attack as an armed attack necessitating self-defense measures.⁸³ To define self-defense in such a way as to legally entitle the aggressor to in turn respond in self-defense is to destroy the legal justification for self-defense embodied in the United Nations Charter.⁸⁴

⁸⁰ Yost Letter, *supra* note 65.

⁸¹ New York Times, *supra* note 71.

⁸² New York Times, May 9, 1970, at 8, col. 1 (city ed.) [Emphasis added.]

⁸³ Falk, *supra* note 69, at 1136.

⁸⁴ For the legal justification of the right of self-defense in the U.N. Charter see L. Goodrich, E. Hambro and A. Simons, *Charter of the United Nations* 344-48 (1969).

Quite clearly, the concept of "armed attack" cannot be woodenly or mechanically applied. An armed attack is properly differentiated from other forms of hostile behavior. Safeguards designed to deal with both types of unauthorized intervention have been incorporated in various treaty instruments. For example, the distinction exists in the Charter of the Organization of American States,⁸⁵ which, in Article 25, differentiates unequivocally between an armed attack and other forms of aggression. The distinction is also found in Articles 3 and 6 of the Inter-American Treaty of Reciprocal Assistance of 1947,⁸⁶ in the North Atlantic Treaty of 1949,⁸⁷ in the Warsaw Treaty of 1955⁸⁸ and in the United States-Japanese Treaty of Mutual Cooperation and Security of 1960.⁸⁹ All these treaties refer only to "armed attack" while specifically noting Article 51 of the United Nations Charter. Interestingly, Article 2 of the Southeast Asia Collective Defense Treaty⁹⁰ (SEATO) also carefully distinguishes between armed attack and subversive activity directed from without; Article 4(1) of the SEATO Treaty covers "aggression by means of armed attack"; while Article 4(2) covers threats "in any way *other* than by armed attack" or "by any *other* fact or situation which might endanger the peace of the area." This distinction has been propounded consistently in treaty instruments drafted after the United Nations Charter, to many of which the United States is a party. Consequently, it would appear that Article 51 has always been understood to embody a narrow construction of "armed attack."⁹¹ The position taken by the President, as justified in the Yost letter, conflicts with that construction.

The latest threat of hostile action launched from a neighboring state has not traditionally justified resort to armed force in preemptive self-defense.⁹² Two examples sufficiently illustrate the point.

The "Caroline," an American vessel used for supplies and communication in a Canadian insurrection, was boarded in an American port at midnight by an armed group acting under the orders of a British officer. The boarding party set the vessel afire and let it drift over Niagara Falls. The U.S. protest resulted ultimately in an apology by Lord Ashburton, the British Special Commissioner to the United States. In a note of reply of August 6, 1842, Secretary of State Webster stated:

[R]espect for the inviolable character of the territory of independent states is the most essential foundation of civilization * * *. Undoubtedly it is just, that, while it is admitted that exceptions growing out of the great law of self-defense do exist, those exceptions should be confined to cases in which the "necessity of that self-defense is instant, overwhelming, and leaving no choice of means and no moment for deliberation."⁹³

More recently, in the Nürnberg trial of War Criminals, the court dealt with the defense, "that Germany was compelled to attack Norway

⁸⁵ Apr. 30, 1948 [1951], 2 U.S.T. 2394, T.I.A.S. No. 2961, 119 U.N.T.S. 3 (effective Dec. 3, 1951).

⁸⁶ Sept. 2, 1947, 62 Stat. 1681 (1948), T.I.A.S. No. 1838 21 U.N.T.S. 77 (effective Dec. 3, 1948).

⁸⁷ April 4, 1949, 63 Stat. 2241 (1949), T.I.A.S. No. 1964, 34 U.N.T.S. 243 (effective Aug. 24, 1949).

⁸⁸ 219 U.N.T.S. 3 (effective Oct. 10, 1955).

⁸⁹ Jan. 19, 1960 [1960], 11 U.S.T. 1632, T.I.A.S. No. 4509, 372 U.N.T.S. 267 (effective Aug. 12, 1960).

⁹⁰ Sept. 8, 1954 [1955], 6 U.S.T. 81, T.I.A.S. No. 3170, 209 U.N.T.S. 28 (effective Feb. 19, 1955).

⁹¹ Lawyers Comm. on American Policy Towards Viet Nam, Vietnam and International Law 27 (1967) [hereafter Lawyers Comm.].

⁹² *Id.*

⁹³ 2 Moore, International Law, sec. 217 (1906).

to forestall an allied invasion, and her action was therefore preventive." The Tribunal said:

"it must be remembered that preventive action in foreign territory is justified only in case of 'an instant and overwhelming necessity for self-defense, leaving no choice of means and no moment of deliberation.' * * * From all this [evidence as to German belief regarding an allied attack on Norway] it is clear that when the plans for an attack on Norway were being made they were not made for the purpose of forestalling an imminent allied landing, but, at the most, that they might prevent an allied occupation at some future date. * * * In the light of all the available evidence it is impossible to accept the contention that the invasions of Denmark and Norway were defensive and in the opinion of the Tribunal they were acts of aggressive war."⁹⁴

Furthermore, the assertion of a claim of collective self-defense is primarily the right of the victim state, and not of the would-be protector.⁹⁵ Collective self-defense involves the right of a nation to request assistance in its defense. It differs fundamentally from any contention that third party nations have a discretionary right to intervene by force in conflicts between other countries.⁹⁶ Assuming *arguendo* that the North Vietnamese launched some sort of "armed attack," either in the traditional sense or in the loose, expansive sense articulated in the Yost letter, the question of determining the victim of such an attack remains. The North Vietnamese activity which, according to the United States argument, constituted an "armed attack" involved the enlarging of staging and supply areas within Cambodia, troop movement in the direction of Phnom Penh but within Cambodia, and the possibility of an eventual threat by North Vietnamese forces within Cambodia to remaining U.S. units in South Vietnam.⁹⁷

On these facts, it is clear that the asserted depredations of North Vietnamese main force units were directed against Cambodia. If a victim need be found, (and for purposes of properly invoking the justification of self-defense under the United Nations Charter a victim must exist),⁹⁸ it is the Cambodian Government of Premier Lon Nol.

On these facts, the only state which could have claimed to be acting in self-defense was Cambodia. There is no indication however, that Cambodia asserted a claim of self-defense. Even if Cambodia had asserted a claim of self-defense, the United States, under the concept of self-defense embodied in the United Nations Charter, could not legally have joined in an action of collective self-defense. For, under the Charter, the right of self-defense does not extend to a state which seeks to associate itself in the defense of a state acting in self-defense.⁹⁹ However, the United States did invoke the doctrine of collective self-defense in conjunction with South Vietnam,¹⁰⁰ which was not in this instance a victim of any "armed attack," the tenuous justifications in the Yost letter notwithstanding.

2. *Proportionality*.—The second precondition necessary for the justification of the use of armed force in self-defense under Article 51 is that the response must be proportionate to the attack.¹⁰¹ A disproportionate response to a situation which validly requires self-defense will transform an otherwise justifiable exercise of the right of self-

⁹⁴ Quoted in Bishop, *International Law* 778-79 (1962).

⁹⁵ D. Bowett, *Self Defense in International Law* 216-18 (1958).

⁹⁶ *Lawyers Comm.*, supra note 91, at 33.

⁹⁷ Yost letter, supra note 65, and *New York Times*, supra note 71.

⁹⁸ U.N. Charter, art. 51.

⁹⁹ *Lawyers Comm.*, supra note 65, at 33.

¹⁰⁰ Yost letter, supra note 65, at 1.

¹⁰¹ Falk, supra note 69, at 1143.

defense into an act of aggression.¹⁰² The application of this standard to the allied thrusts into Cambodia reflects the basic flaw in labelling North Vietnamese activities in Cambodia an armed attack on Vietnam or allied forces therein. The only military operations against which the proportionality of the allied incursion can be measured are the expansion of the Cambodian sanctuaries and the concurrent attacks on Cambodian forces by North Vietnamese troops. Such measurements would be difficult to make as they turn on factual determinations not readily available. But the standard of proportionality cannot be applied in this case as the nations using armed force under the right of collective self-defense were not the objects of an armed attack.

Ambassador Yost's letter states that "North Vietnam has stepped up guerrilla actions into South Vietnam and is concentrating its main forces in these base areas in preparation for further massive attacks into South Vietnam."¹⁰³ This factual assertion is not reflected in President Nixon's address of April 30 or subsequent press conference of May 9. The President indicated that he was responding to the threat which would exist to United States forces following another withdrawal of 150,000 men should North Vietnamese forces succeed in consolidating their position in Cambodia through the overthrow of the Government of Premier Lon Nol or by a severe limitation of its power.¹⁰⁴ Without dwelling on this rather crucial discrepancy, one cannot seriously say that the incursion into Cambodia of at least 50,000 allied troops on six fronts with accompanying air support,¹⁰⁵ a flotilla of 140 gunboats¹⁰⁶ and a one-hundred mile allied blockade of the Cambodian coastline¹⁰⁷ was a proportionate response of self-defense to "stepped up guerrilla action,"¹⁰⁸ the only alleged new military action emanating from Cambodia against South Vietnam.

B. The Neutrality of Cambodia

As President Nixon affirmed in his address of April 30, the United States acknowledged Cambodia neutrality.¹⁰⁹ Respect for that neutrality was assured by a diplomatic note during the Johnson administration¹¹⁰ and was reiterated on numerous occasions by repeated demands that North Vietnam respect the neutrality and territorial integrity of Cambodia.¹¹¹

Generally, a neutral state must remain impartial while the belligerent state must respect the neutral's impartiality.¹¹² The belligerent must also respect the territorial integrity of the neutral state. On the other hand, the neutral state is obligated to prevent the use of its territory for the launching of attacks by one belligerent upon another.¹¹³

¹⁰² Because art. 51 is an exception to the general rule that the use of armed force without prior consultation with the United Nations is illegitimate, any use of armed force which does not fall within this exception is aggressive.

¹⁰³ Yost letter, *supra* note 65, at 1.

¹⁰⁴ New York Times, *supra* note 71, at 2, col. 3.

¹⁰⁵ New York Times, May 10, 1970, sec. 4, at 3, col. 1 (city ed.)

¹⁰⁶ New York Times, May 12, 1970, at 1, col. 2 (city ed.)

¹⁰⁷ New York Times, May 13, 1970, at 1, col. 4 (city ed.)

¹⁰⁸ Yost letter, *supra* note 65, at 1.

¹⁰⁹ New York Times, *supra* note 71, at 2, col. 1.

¹¹⁰ United States note to the Kingdom of Cambodia, Dec. 4, 1967, 58 Department State bulletin 124 (1968).

¹¹¹ The most recent United States affirmation of Cambodian neutrality was made in an address entitled "Two Aspects of the Search for Peace" by Secretary of State William P. Rogers before the Cornell Alumni Ass'n on Apr. 18, 1970, in New York City. Department State Publication 8525, General Foreign Policy Ser. 243, May, 1970.

¹¹² 2 L. Oppenheim, International Law 673-74 (7th ed. II. Lauterpacht 1948).

¹¹³ *Id.* at 704.

While a state may disregard violations of its territorial integrity, a neutral state has the duty to protest such violations, because failure to do so would offend its duty to maintain impartiality.¹¹⁴ However, the breach of neutrality by either a belligerent state or a neutral state does not terminate neutral status.¹¹⁵ Only a declaration of war or hostilities amounting to acts of war by one of the parties will have that effect.¹¹⁶

The Administration argues that North Vietnamese forces have violated the territorial integrity of Cambodia and that they have utilized Cambodia as a base for military operations against South Vietnam.¹¹⁷ Certainly, these actions constitute a breach by North Vietnam of Cambodian neutrality. But they do not terminate Cambodia's neutral status. Indeed, it has been the announced policy of the Cambodian government, albeit unsuccessful, to keep its territory free of armed Viet Cong troops.¹¹⁸ Hence under traditional principles of international law, the movement of American forces into Cambodia is itself a violation of that state's neutrality unless some further justification can be shown.

The argument that Cambodia ratified the American action after it had taken place is not persuasive. In fact, two members of the Cambodian government made an initial protest.¹¹⁹ Clearly, the joint U.S.-South Vietnamese incursion constituted a fundamental breach of Cambodian neutrality which could not later be rectified by acquiescence, particularly since the Cambodian government had little choice but to acquiesce. Nor does the argument that the areas subjected to invasion were no longer under the effective political control of Cambodia justify the incursion. The political and military realities do not diminish in law the rights of the Government of Cambodia with respect to the maintenance of its territorial integrity and neutrality. Otherwise, one might argue that South Vietnam could claim no rights over Viet Cong-held portions of its own territory. The argument that, under general principles of international law and particularly neutrality, Cambodia's failure to repel the North Vietnamese presence justified the allied incursions into a neutral country must fail in view of the treaty obligation, under Article 33(1) of the United Nations Charter, to *first of all* seek a solution of disputes, other than an armed attack, by peaceful means.

C. Rights and Obligations under SEATO

The Administration did not attempt to justify its policy under the Southeast Asia Collective Defense Treaty (SEATO). The reluctance to invoke the SEATO commitment is understandable since a colorable case for the Cambodian incursion under the SEATO Treaty cannot be made.

At the outset, the SEATO Treaty obligates the signatories to uphold the United Nations Charter.¹²⁰ As demonstrated above, U.S. actions in Cambodia are violative of that document, and therefore violative of the SEATO Treaty as well. If pursued further, the inquiry discloses other damaging discrepancies. First, the treaty speaks of

¹¹⁴ *Id.* at 675.

¹¹⁵ *Id.* at 752.

¹¹⁶ *Id.* at 753.

¹¹⁷ Yost letter, *supra* note 65, at 1.

¹¹⁸ New York Times, Dec. 28, 1967, at 17, col. 4.

¹¹⁹ Cf. statement of Foreign Minister, Yem Sambour Time, May 11, 1970, at 13, col. 3, statement of Information Minister, Trinh Hoanh, New York Times, May 2, 1970, at 4, col. 4.

¹²⁰ Southeast Asia Collective Defense Treaty, *supra* note 90, art. 1.

meeting "the common danger in accordance with its [each country's] constitutional processes."¹²¹ Thus, any action taken in violation of such constitutional processes, as argued in the discussion of the constitutional issues above, is *per se* invalid under the treaty. Secondly, the SEATO Treaty creates certain obligations in the event a party is the victim of an "armed attack." In Articles 4(1) and 4(2), the treaty carefully establishes a distinction between an "armed attack" and "subversive activities directed from outside." As pointed out above, the thesis that an "armed attack," to which the United States could legally respond, occurred, cannot be sustained. The late Secretary of State John Foster Dulles himself cautioned that the treaty language would not support the contention that "any country which feels it is being threatened by subversive activities in another country is free to use armed force against that country."¹²² The SEATO Treaty expressly requires, moreover, that the parties consult before taking any action to meet the common danger posed by such outside subversion.¹²³ The United States made no effort to consult with the SEATO allies prior to taking action in Cambodia. More important, the failure to obtain Cambodian consent or act in response to a Cambodian invitation resulted in a direct, unequivocal violation of Article 4(3), Cambodia having been designated a state within the scope of Article 4 by the September 1954 Protocol to the SEATO Treaty.¹²⁴ The Cambodian incursion, demonstrably violative of the SEATO Treaty, could hardly have been justified under it.

D. The Position Taken by the United States in Analogous Situations

The action taken by the United States in Cambodia is inconsistent with the position propounded by the United States in the past. When confronted with similar types of action initiated by other states, United States spokesmen in the United Nations have consistently condemned unilateral attacks directed across national borders in pursuit of foreign troops using foreign soil as sanctuaries.

1. *Tunisia, 1957*.—For example, in 1957, French forces operating in Algeria attacked Sakiet-Sidi-Youssef in Tunisia, then being used as a sanctuary and staging area by Algerian revolutionary forces. The United States publicly expressed concern about the incident and the Department of State summoned the French Ambassador to explain the French action.¹²⁵ The official French explanation markedly parallels the stated U.S. objective in Cambodia, to destroy enemy sanctuaries, staging and supply bases used by guerrilla forces for raids into Algeria.

2. *Yemen, 1964*.—In 1964 Ambassador Stevenson, speaking in the Security Council, condemned a British bombing attack on Habbaniya in Yemen which was undertaken in response to Yemeni attacks against the British Protectorate of Aden.¹²⁶

3. *Middle East*.—During the course of the ongoing conflict in the Middle East, the United States has repeatedly expressed, in the United Nations and in other forums, negative reactions ranging from con-

¹²¹ *Id.* at art. 4(1).

¹²² Statement of Secretary of State John Foster Dulles, hearings before the Senate Committee on Foreign Relations on the President's proposal on the Middle East, 81st Cong., First sess., pt. I, at 28 (1957).

¹²³ Southeast Asia Collective Defense Treaty, *supra* note 90, art. 4(2).

¹²⁴ Protocol to the Southeast Asia Collective Defense Treaty, Sept. 8, 1954, 1955 6 U.S.T. 87, T.I.S. 36 (effective Feb. 19, 1955).

¹²⁵ 38 Department State bulletin 333 (1958).

¹²⁶ 19 U.N. SCOR 1108th meeting 67 (1964).

cern to condemnation of Israeli attacks upon Arab guerrilla sanctuaries in other Arab countries.¹²⁷ The Israeli raids were designed to accomplish the dual objectives of reprisal and destruction of guerrilla sanctuaries and staging bases.

The American incursion into Cambodia hardly lends credence to the aforementioned expressions of dismay, much less to any future United States attempts to limit the use of armed force as an instrument of national policy throughout the world. The Cambodian affair invites cynicism toward subsequent United States efforts to encourage respect for law in the conduct of international affairs.

While patently illegal in themselves, the allied incursions into Cambodia also compound the prolonged violation of international law by the massive military presence of the United States in Vietnam.

II. VIETNAM

A. *Collective Self-Defense under the United Nations Charter*

The Department of State Memorandum¹²⁸ justified United States action in Vietnam as collective self-defense in response to an "armed attack;" as noted above, the concept of "armed attack" should be construed narrowly to restrict the right of self-defense to instances "when the necessity for action" is "instant, overwhelming and leaves no choice of means, and no moment for deliberations."¹²⁹

But the Memorandum's description of the "armed attack" fails to meet the standard embodied in Article 51 of the United Nations Charter. Long-smoldering conditions of unrest, subversion and infiltration described in the Memorandum, continued over a period of ten years in South Vietnam. Under Article 33(1) of the Charter, the United States was required to "*first of all*, seek a solution by negotiation, inquiry . . . or other peaceful means of their own choice." Equally telling is the Mansfield Report which indicates that prior to 1965, infiltration from North Vietnam "was confined primarily to political leaders and military leadership," though, by 1962, "United States Military Advisers and service forces in South Vietnam totaled approximately 10,000 men."¹³⁰ Apparently, Department of Defense figures indicate that there were only 400 North Vietnamese troops in South Vietnam in March, 1965.¹³¹ Large numbers of North Vietnamese troops infiltrated into South Vietnam only after the United States intervened in 1965 to prevent the collapse of the Saigon government:

U.S. combat troops in strength arrived at that point in response to the appeal of the Saigon authorities. The Vietcong counter-response was to increase their military activity with forces strengthened by intensified local recruitment and infiltration of regular North Vietnamese troops. With the change in the composition of opposing forces, the character of the war also changed sharply.¹³²

Because the sequence of events in South Vietnam cannot be construed to be an "armed attack" under the criteria outlined above, the United States could not rely on collective self-defense to justify its position.

¹²⁷ 58 Department State bulletin 509 (1968). U.N. Doc. S/RES/248 (1968). 60 Department State bulletin, 340 (1969). 62 Department State bulletin, 226 (1970).

¹²⁸ Memorandum, *supra* note 67, at 5274-79.

¹²⁹ Q. Moore, *supra* note 93.

¹³⁰ The Vietnam Conflict: The Substance and the Shadow, report submitted to the Senate Committee on Foreign Relations, Jan. 6, 1966, 2.

¹³¹ Schlesinger, Vietnam and the 1968 Elections, at 113 Cong. Rec. S14454 (daily ed. Oct. 9, 1967).

¹³² The Vietnam Conflict: The Substance and the Shadow, Report Submitted to the Senate Committee on Foreign Relations, Jan. 6, 1966, 1.

B. The Geneva Accords of 1954

1. *Election Provisions.*—In justifying South Vietnam's refusal to implement the election provision of the 1954 Geneva Accords, the Department of State's Memorandum states that:

* * * the South Vietnamese Government's failure to engage in consultations in 1955, with a view to holding elections in 1956, involved no breach of obligation. The conditions in North Vietnam during that period were such as to make impossible any free and meaningful expressions of popular will.¹³³

But the alleged repression of the popular will in either North or South Vietnam could not, under the Accords, entitle either regime to refuse to plan and consult about the elections of unification. Between July 1955 and July 1956, the two regimes were obligated to consult in order to determine the framework for the elections; South Vietnam would have been free to demand whatever safeguards it considered necessary for proper elections.¹³⁴

To the extent that the United States encouraged the Saigon government to avoid consultation, it breached its duty under Article 27 of the Cease-fire Agreement, as a "successor" to France, to ensure the observance of its provisions. The United States status as a "successor" to France under the Agreement derived from the Department of State Memorandum's claim that Articles 16 and 17 justified the introduction of United States military personnel, arms and equipment into South Vietnam. The United States could claim the protection of Articles 16 and 17 only as a "successor" to the rights and obligations of the French.

2. *Articles 16 and 17.*—The Memorandum also contends that intensified communist aggression in late 1961 justified a substantial increase in the number of military personnel and types of equipment introduced into South Vietnam. But the International Control Commission (ICC), in a Special Report prepared by the Indian-Canadian majority, specifically rejected the claim that increased aid was permissible for South Vietnamese self-defense. The Report referred to the "Geneva Agreement . . . and the obligations resulting therefrom," and added that:

* * * the Commission concludes that the Republic of Vietnam has violated Articles 16 and 17 of the Geneva Agreement in receiving the increased military aid . . . [and that] the establishment of a U.S. Military Assistance Advisory Command in South Vietnam, as well as the introduction of a large number of U.S. military personnel . . . amounts to a factual military alliance, which is prohibited under Art. 19 of the Geneva Agreement.¹³⁵

C. Reprisals of 1965

The guerrilla attacks on Pleiku on February 7, 1965, marked the beginning of active United States war actions in South Vietnam and the extension of those actions to North Vietnam. However, no attempt was made to describe such war actions as collective self-defense. They were officially explained as reprisals. Terming the attacks near Pleiku, in which 7 Americans were killed and 109 wounded, provocations, President Johnson announced that

¹³³ Memorandum, *supra* note 67.

¹³⁴ Final declaration of the Geneva Conference, July 21, 1954, par. 7, Senate Committee on Foreign Relations, Background Information Relating to Southeast Asia and Vietnam, 89th Cong., first sess., at 58 (1965).

¹³⁵ Special report, June 2, 1962, par. 20, hearings on supplemental foreign assistance, fiscal year 1966—Vietnam before the Senate Committee on Foreign Relations, 89th Cong., second sess., at 740 (1966) [hereafter 1966 hearings].

* * * retaliatory [air] attacks against barracks and staging area * * * in North Vietnam [were] today [launched] in response to [these] provocations ordered and directed by the Hanoi regime.¹³⁶

Reprisals involving the use of armed force violate the United Nations Charter. The Security Council condemnation of British raids against Yemen in April 1964, in reprisal for Yemeni attacks against the British Protectorate of Aden, generally illustrates the U.N. position. Moreover, Ambassador Adlai Stevenson emphasized at the time United States disapproval of "retaliatory raids, wherever they occur and by whomever they are committed."¹³⁷

Under the Charter, the U.S. reprisals were also illegal in two other respects. First, they were not directed against insurgent forces in South Vietnam which staged the attack on Pleiku, but against North Vietnam. Second, the massive bombing raids were totally disproportionate to the original attacks to which they supposedly responded. The air raids vastly exceeded the force or destruction of the attacks near Pleiku and resulted in the escalation of the previous conflict into a war against North Vietnam.

Finally the ICC rejected the arguments promulgated in justification of the American reprisals. On February 13, 1965, an ICC Special Report written by the Indian-Polish majority advised the cochairmen of the Geneva Conference that U.S. military actions against the North on February 7 and February 8, 1965, "indicated violations of the Geneva Agreement."¹³⁸

D. Duties and Rights under SEATO

SEATO provisions do not allow, much less obligate, the United States to commit thousands of troops to South Vietnam. First, under Articles 1 and 6 of SEATO, any action in violation of the United Nations Charter cannot be justified under SEATO since those articles pledge the signatories' respect and support for the Charter.

Although the Department of State's Memorandum speaks of the "obligation . . . to meet the common danger in the event of armed aggression" under Article 4(1), the precise wording of the treaty language in Article 4(1) is "aggression by means of armed attack." As already discussed, North Vietnamese activities in South Vietnam cannot be construed as an "armed attack" under Article 51 of the United Nations Charter. That the activities did not constitute an "armed attack" under SEATO is apparent from Article 2:

In order more effectively to achieve the objectives of this Treaty, the Parties separately and jointly by means of continuous and effective self-help and mutual aid will maintain and develop their individual and collective capacity to resist *armed attack* and to prevent and *counter subversive activities directed from without against their territorial integrity and political stability*. [Emphasis added.]

Thus, under Article 4(2), unless an armed attack has occurred, the Parties must "consult immediately in order to agree on the measures which should be taken for the common defense." The Communique of the SEATO meeting, dated April 15, 1964, did not indicate a finding of an "armed attack" against South Vietnam, and merely reaffirmed that members of SEATO should remain prepared to take further steps in fulfillment of their obligations under the treaty.¹³⁹ The United

¹³⁶ Cmd. 2756, Viet Nam No. 3, at 10 (R. Falk ed. 1965).

¹³⁷ 19 U.N. SCOR 1108th meeting 67 (1964).

¹³⁸ 1966 hearings, *supra* note 134, at 742.

¹³⁹ 50 Department of State bulletin 692 (1964).

States never obtained collective consent from SEATO members for its combat actions in Vietnam: thus, the United States acted and continues to act in violation of SEATO's prohibition of unilateral military action except in case of an "armed attack." Obviously, this violation affects the legal position of the United States. It also undermines the argument that the United States must act in Vietnam to maintain its credibility as a nation which fulfills its treaty obligations since the continued United States presence in Vietnam results in the violation of its treaty obligations under SEATO and the United Nations Charter.

Assuming, *arguendo*, that SEATO had approved United States military operations in Vietnam, such action would still have to be authorized by the Security Council under Article 53 of the U.N. Charter as an enforcement action by a regional arrangement.

E. Article 33(1) of the United Nations Charter

Article 33(1) imposes a duty on "parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security," first of all to seek a solution by peaceful means of their own choice. Yet the United States did not seek a solution to the growing conflict in Indochina through the world body prior to using armed force. At least by 1954, the United States had given aid to South Vietnam and had operated a Military Assistance Command there since February, 1962. The United States has alleged that infiltration of troops from the North to the South has continued since at least 1959.¹⁴⁰ Nevertheless, the United States did not submit the question of the Vietnam dispute to the Security Council until January 31, 1966,¹⁴¹ approximately one year after the commencement of the bombing of the North. And the first American report to the Council was submitted only in 1964.¹⁴²

Potential means for a peaceful settlement included General de Gaulle's proposal in 1963 of a neutral Vietnam,¹⁴³ a subsequent French call in 1964 to reconvene the Geneva Conference on Laos,¹⁴⁴ and a suggestion by Secretary-General U Thant in 1964 that a secret meeting between representatives of North Vietnam and the United States be arranged in Burma.¹⁴⁵ The United States rejected each of these alternatives over the three year intervening period between General Maxwell Taylor's Report of November, 1961 (which dealt with the possible contingency of taking defensive measures directly against the North),¹⁴⁶ and the initiation of the bombing raids in 1965. During that period, the United States must have anticipated or contemplated the increased use of armed force against North Vietnam. The failure to resort to the United Nations is therefore inexplicable.

¹⁴⁰ Memorandum, *supra* note 67.

¹⁴¹ Senate Committee on Foreign Relations, background information relating to Southeast Asia and Vietnam, 89th Cong., second sess., at 271-73 (1965).

¹⁴² *Id.* at 132-35.

¹⁴³ *Id.* at 14.

¹⁴⁴ *Id.* at 16.

¹⁴⁵ Staff of Senate Republican Policy Committee, *The War in Vietnam*, in 113 Cong. Rec. 5242, 5250 (daily ed. May 9, 1967).

¹⁴⁶ *The Vietnam hearings*, 171-72 (Vintage ed. 1966).

III. THE PROSPECT OF CONTINUING ARMED CONFLICT

A fundamental violation of the United Nations Charter is particularly grievous when committed by such an immensely powerful and influential supporter of the United Nations as the United States. But, should the United States succeed in legitimizing its position by claiming that measures of self-defense were justified in response to questionably documented "armed attacks," the damage to the United Nations would be irreparable. The acceptance of a broad definition of "armed attack" would render virtually meaningless those provisions of the United Nations Charter which provide machinery for anticipatory conflict resolution. Conditions favorable to justice and respect for the obligations arising from treaties and other sources of international law could not be maintained. The determination stated in the Preamble, "to save succeeding generations from the scourge of war" would become an empty hope.

CONCLUSION

The United States today faces a grave crisis. Never before in our history has the nation been so fundamentally divided over issues of foreign policy. More important, growing numbers of our citizens believe themselves frustrated in all efforts to change the course of policies they regard as unwise or immoral. The situation, if allowed to worsen, could have grave consequences for the future viability of our democracy.

The debate over the nation's course in Southeast Asia reflects more than a mere disagreement with foreign policy. It indicates a dangerous shift in the balance of power within our constitutional system. It is thus imperative, as never before, that the Congress vigorously reassert its responsibilities as the only branch of government constitutionally empowered to decide issues of war and peace. It is incumbent upon each member of Congress, whether he opposes or defends the present policy in Southeast Asia, to consider seriously the consequences of congressional inaction.

We have witnessed in the atomic age a continual exacerbation of the tensions which tend to divide the world community. When coupled with the exponential increase in the magnitude of man's destructive capabilities, this process invites disaster. Therefore, actions by the world's most powerful nation which either violate or ignore the basic tenets of international Law, as embodied in the United Nations Charter, constitute culpable irresponsibility. We are painfully aware that in this regard the United States does not stand alone. But historically, the United States has represented itself as a moral force in the world and has repeatedly affirmed its faith in the rule of law. Quite simply, United States actions should conform to that rhetoric. Respect for the United Nations Charter and use of machinery for conflict resolution which exists under it must comprise the keystone of American foreign policy. Ultimately, our security in the world depends as much upon the foregoing considerations as upon the wise exercise of armed power.

LEGAL DIMENSIONS OF THE DECISION TO INTERCEDE IN CAMBODIA*

(By John Norton Moore, Professor of Law, University of Virginia)

In appraising national security decisions, such as the recent decision to send United States combat forces into the North Vietnamese and Vietcong border sanctuaries in Cambodia, it is useful to focus on three interrelated questions. First, is the decision consistent with national and international law? Second, is the decision consistent with the national interest? And third, are there other alternatives which are likely to be more satisfactory in implementing the national interest? Each of these questions represents an important perspective for appraisal. Though the answer to the first question is important for answering the second and third questions, international lawyers should resist the temptation to regard an affirmative answer to the legal question as equivalent to proof that a decision is the best option for national action. Conversely, international lawyers should also avoid the temptation to regard personal doubts about the efficacy of a particular option as equivalent to proof of the illegality of the option. An international legal perspective is a critical input in national security decisions and should have a major role in defining the national interest and in introducing and delimiting options for national action.¹ Efforts to overuse international law, however, whether by way of support or criticism of national action serve only to obscure the vital role that an international-legal perspective should play.

In focusing on the legal dimensions of the decision to intercede in Cambodia, this paper will first examine the international law issues in the conflict, will then examine the internal constitutional issues and finally will focus on the functioning of the national security process in the Cambodian crisis.

I. THE INTERNATIONAL LAW ISSUES

A. A brief background of the Cambodian Conflict

Cambodia emerged from the Geneva Conference of 1954, which ended the first Indochina War, as a fully autonomous state.² Article Twelve of the Final Declaration of the Conference provided that: "each member of the Geneva Conference undertakes to respect the sovereignty, the independence, the unity and the territorial integrity * * * [of Cambodia, Laos and Vietnam], and to refrain from any interference in their internal affairs."

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¹ See Falk, "Law, Lawyers, and the Conduct of American Foreign Relations," 78 Yale Law J. 919 (1969); Moore, "The Control of Foreign Intervention in Internal Conflict," 9 Va. J. Int'l Law 205, 310-14 (1969).

² See generally R. Randle, "The Settlement for Cambodia" in *Geneva 1954: The Settlement of the Indochinese War* 482-503 (1969).

In addition, Articles Four and Twenty-one of the Agreement on the Cessation of Hostilities in Cambodia, which was signed by North Vietnam's Vice-Minister of National Defence, made clear that foreign military forces were to be withdrawn from Cambodia.

At the Conference, the Chinese Premier, Chou En-lai, sought an agreement to prevent Cambodia from joining military alliances such as SEATO. Though there was general Conference agreement on the neutralization of Cambodia, the Cambodian delegation successfully held out for an agreement permitting Cambodia to request foreign military assistance in the event its security was threatened.³ Robert Randle's description of the Geneva negotiations is quite specific on this point.

"Sam Sary [a member of the Cambodian delegation] said he would not sign the agreements because they limited the freedom of the Cambodian government to decide whether or not it would join an alliance; moreover, the agreements limited Cambodia's right to request military assistance from the United States or any other country. Limitations such as these, Sam Sary said, were unacceptable restrictions upon Cambodia's newly won independence. The Cambodian minister also expressed concern for the future of his country, which he said might become an object of Communist expansionism, and he wanted to reserve the right to ask the United States to establish bases on Cambodian territory."

The great-power ministers argued with Sam Sary to no avail. The American diplomat assured him the SEATO pact, then being prepared, would give Cambodia some assurance against Communist aggression, but Sam Sary persisted. Mendés-France's midnight deadline passed; and shortly after 2 a.m. the Cambodian minister announced that he had seventeen other demands! Molotov thereupon announced that he would acquiesce in the first demand: Cambodia would be permitted to request foreign military assistance in the event its security was threatened.⁴

This understanding was embodied in a unilateral declaration by the Cambodian delegation at Geneva which stated:

The Royal Government of Cambodia is resolved never to take part in an aggressive policy and never to permit the territory of Cambodia to be utilized in the service of such a policy.

The Royal Government of Cambodia will not join in any agreement with other States, if this agreement carries for Cambodia the obligation to enter into a military alliance not in conformity with the principles of the Charter of the United Nations, or as long as its security is not threatened, the obligation to establish bases on Cambodian territory for the military forces of foreign Powers.

The Royal Government of Cambodia is resolved to settle its international disputes by peaceful means, in such a manner as not to endanger peace, international security and justice.

During the period which will elapse between the date of the cessation of hostilities in Viet Nam and that of the final settlement of political problems in this country, the Royal Government of Cambodia will not solicit foreign aid in war material, personnel or instructors except for the purpose of the effective defence of the territory.⁵

The second and fourth paragraphs of this declaration were incorporated in Article Seven of the Agreement on the Cessation of Hostilities in Cambodia. The declaration was also adverted to in Article Four of the Final Declaration of the Conference in which the Conference took note of Cambodia's declaration "not to request foreign aid, whether in war material, in personnel or in instructors, except for the purpose of the effective defence of . . . [its] territory . . .," and in Article Five of the Final Declaration in which the Conference took note of the Cambodian declaration:

³ R. Randle, note 2 above, at 339-41, 486.

⁴ R. Randle, note 2 above, at 340.

⁵ R. Randle, note 2 above, at 485.

that * * * [it] will not join in any agreement with other States if * * * [the] agreement includes the obligation to participate in a military alliance not in conformity with the principles of the Charter of the United Nations * * * or, so long as * * * [its] security is not threatened, the obligation to establish bases on Cambodian * * * territory for the military forces of foreign Powers.

In short, the Conference provided that Cambodia was to remain neutral but would have the right to obtain the full range of foreign assistance when necessary for the effective defense of Cambodia. In the absence of such a threat to Cambodian security, foreign military bases were to be prohibited on Cambodian territory even if Cambodia consented to their presence.

Prince Norodom Sihanouk moved rapidly after the Geneva Conference to establish Cambodian neutrality. Though from time to time he was accused by both Communist and non-Communist states as being pro-Western or pro-Communist, the "mercurial" Prince seems to have been genuinely preoccupied throughout most of the interim years with preservation of Cambodian neutrality as the best way to preserve Cambodian existence. In May 1955 Sihanouk did enter into a military aid agreement with the United States but the defensive nature of the agreement and the limited quantities of military supplies were unanimously declared by the International Commission for Supervision and Control in Cambodia as "not in excess of * * * [Cambodia's] effective defence requirements."⁶ During the early sixties Sihanouk began to take a progressively harsher line toward the United States, culminating in renunciation of American aid in 1963 and termination of diplomatic relations in 1965. Apparently from 1965 until the recent Cambodian action the United States has not provided Cambodia with significant military or economic assistance. In contrast, as the Vietnam War heated up Vietcong and North Vietnamese military presence and influence in Cambodia grew progressively. By March and April of this year the *New York Times* reported estimates ranging from forty to fifty thousand Vietcong and North Vietnamese troops in Cambodia.⁷ It seems to be generally accepted that at least during the last several years sizeable Vietcong and North Vietnamese forces have used Cambodian territory for infiltration into South Vietnam, for supply, command, communications and training functions in support of belligerent activities in South Vietnam, and as staging areas and sanctuaries for repeated attacks on targets in South Vietnam.⁸

Perhaps because he suspected a Communist victory in Indochina, during the last few years Sihanouk seemed increasingly leery of challenging the substantial North Vietnamese and Vietcong forces operating on Cambodian territory. In February of this year, however, Cambodian forces began engaging North Vietnamese forces and by March domestic opposition to the sizeable Vietnamese forces in Cam-

⁶ R. Randle, note 2 above, at 561.

⁷ *New York Times* March 17, 1970, at 1, col. 8 (city ed.); *New York Times*, Apr. 4, 1970, at 3, col. 1 (city ed.); *New York Times*, Apr. 23, 1970, at 4, col. 4 (city ed.).

⁸ According to John Stevenson, the Legal Adviser of the Department of State:

"In the past five years, 150,000 enemy troops have been infiltrated into South Viet-Nam through Cambodia. In 1969 alone, 60,000 of their military forces moved in from Cambodia. The trails inside Cambodia are used not only for the infiltration of troops but also for the movement of supplies. A significant quantity of the military supplies that support these forces came through Cambodian ports"

"During 1968 and 1969 the Cambodian bases adjacent to the South Vietnamese provinces of Tay Ninh, Ploeku, and Kontum have served as staging areas for regimental-size Communist forces for at least three series of major engagements—the 1968 Tet offensive, the May 1969 offensive and the post-Tet 1969 offensive."

John R. Stevenson, "Unpublished Statement before the Hammaraskjold Forum of the Association of the Bar of the City of New York on the Issues of International Law Involved in United States Military Actions in Cambodia," *New York Times*, May 28, 1970.

bodia led to a Cambodian demand that the North Vietnamese leave Cambodian territory.⁹ At the same time, Prince Sihanouk undertook a trip to Moscow and Peking apparently to persuade the Soviets and Chinese to assist in removing the Vietnamese presence.¹⁰ During his absence on March 18, Premier Lon Nol and Deputy Premier Sirik Matak, who had exercised substantial authority within the Cambodian government, since the summer of 1969, deposed Prince Sihanouk as Chief of State. According to the *New York Times* there was no evidence of foreknowledge of the Lon Nol takeover among senior United States officials.¹¹ The more conservative Lon Nol government continued to seek North Vietnamese and Vietcong withdrawal and intensified the military effort to dislodge them from border sanctuaries. The North Vietnamese and Vietcong reacted with military initiatives apparently directed at widening the sanctuaries, restoring supply routes to the Cambodian port of Sihanoukville, and threatening the viability of the new government.¹² Throughout the month of April the daily accounts of the Cambodian fighting indicate a steadily deteriorating military situation.¹³ On April 20 Cambodia requested the use of units of ethnic Cambodians from Vietnam which had been associated with American-operated units in South Vietnam.¹⁴ Two days later Cambodia appealed to the United Nations Security for assistance from all countries to help the new government fight "invading Vietcong and North Vietnamese forces."¹⁵ And on April 23 the *New York Times* reported that :

An atmosphere of heightening national emergency is overtaking Cambodia.

The emergency atmosphere is due to evidence that the Cambodian Army is unable to turn back the Vietnamese Communist forces, who at one point are within 15 miles of the capital, and to the lack of response from any nation except Indonesia to Premier Lon Nol's appeal to all nations for arms aid. * * *¹⁶

Military analysts said the 30,000-man Cambodian Army would be no match for the 40,000 to 50,000 North Vietnamese and Vietcong soldiers in Cambodia, if a determined assault were pressed by the Communist forces.¹⁷

On April 27, three days before the United States and South Vietnam interceded in Cambodia, the *New York Times* described the situation in Cambodia as "rapidly deteriorating."¹⁸

This brief background of the events leading up to the April thirtieth United States and South Vietnamese intercession in Cambodia necessarily omits a number of important events such as repeated United States protests against North Vietnamese and Vietcong use of neutral

⁹ See New York Times, Mar. 16, 1970, at 1, col. 5 (city ed.); New York Times, Mar. 17, 1970, at 1, col. 8 (city ed.).

"Cambodia had sent notes to the Vietcong and Hanoi Governments demanding that the troops leave by yesterday, but the deadline passed with no apparent exodus of troops." *Ibid.*

¹⁰ See New York Times, Mar. 16, 1970, at 11, col. 1 (city ed.).

¹¹ New York Times, May 6, 1970, at 17, col. 6 (city ed.).

¹² The New York Times reported "an acceleration of the Communist invasion" following efforts by the new government "for negotiations on its demand for the withdrawal of Vietnamese Communist troops." New York Times, May 7, 1970, at 16, col. 1 (city ed.).

¹³ See, e.g., New York Times, Apr. 8, 1970, at 1, col. 8 (city ed.); New York Times, Apr. 9, 1970, at 1, col. 4 (city ed.); New York Times, Apr. 10, 1970, at 1, col. 4 (city ed.); New York Times, Apr. 13, 1970, at 1, col. 2 (city ed.); New York Times, Apr. 20, 1970, at 1, col. 8 (city ed.); New York Times, Apr. 21, 1970, at 1, col. 6 (city ed.); New York Times, Apr. 23, 1970, at 1, col. 8 (city ed.); New York Times, Apr. 25, 1970, at 3, col. 4 (city ed.); New York Times, Apr. 27, 1970, at 1, col. 8 (city ed.); New York Times, Apr. 27, 1970, at 5, col. 1 (city ed.).

¹⁴ See New York Times, May 4, 1970, at 1, col. 6 (city ed.). Apparently about 2,000 ethnic Cambodians arrived in Phnom Penh on May 1 and 2. *Ibid.*

¹⁵ See New York Times, Apr. 23, 1970, at 4, col. 5 (city ed.).

¹⁶ New York Times, Apr. 23, 1970, at 1, col. 8 (city ed.).

¹⁷ New York Times, Apr. 23, 1970, at 4, col. 4 (city ed.).

¹⁸ New York Times, Apr. 27, 1970, at 5, col. 1 (city ed.).

Cambodian territory, Cambodian protests against sporadic allied incursions into Cambodian territory, Cambodian requests to the International Supervisory Commission for investigation of the activities of belligerents in both camps, the formation by Sihanouk of a Cambodian government in exile, and the apparent complicity of the Lon Nol government in the killing of large numbers of Vietnamese civilians living in Cambodia.¹⁹

B. The Rights and Duties of Cambodia

Cambodian obligations with respect to the war in Vietnam stem from at least four sources. They are the United Nations Charter, the Geneva Accords, the customary international law of non-intervention, and the customary international law of neutrality.

Cambodia is, of course, bound by Article 2(4) of the United Nations Charter which prohibits "the threat or use of force against the territorial integrity or political independence of any state. . . ." To the extent that the North Vietnamese use of force against South Vietnam violates Article 2(4) of the Charter,²⁰ Cambodia would also be prohibited from providing assistance to the North Vietnamese forces.

Secondly, "as long as its security is not threatened" Cambodia is obligated by Article Seven of the Agreement on the Cessation of Hostilities in Cambodia not to permit the establishment of "bases on Cambodian territory for the military forces of foreign Powers." Moreover, arguably it is bound by Article Twelve of the Final Declaration of the Conference "to refrain from any interference in * * * [the] internal affairs [of Viet Nam]." ²¹ North Vietnamese and Vietcong bases in Cambodia used to prosecute the Vietnam War would seem to violate these provisions of the Geneva Accords, at least to the extent that Cambodia is able to prevent their establishment in Cambodia.

Thirdly, Cambodia is bound by the customary law of non-intervention.²² The 1965 General Assembly Declaration on Inadmissibility of Intervention is representative of many authoritative pronouncements when it provides:

[N]o State shall organize, assist, * * * or *tolerate* subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State. * * * [Emphasis added.] ²³

Thus, to the extent that it is politically and militarily feasible, Cambodia is under an obligation to prevent the use of its territory for Vietcong armed attacks directed against the Saigon government.

Finally, Cambodia is bound by the customary international law of neutrality, which according to most commentators survived the United Nations Charter.²⁴ Application of the customary law of neutrality would seem particularly appropriate in view of the neutralization of Cambodia by the Geneva Accords and the repeated declarations

¹⁹ See New York Times, Apr. 11, 1970, at 1, col. 4 (city ed.); New York Times, Apr. 14, 1970, at 1, col. 5 (city ed.); New York Times, Apr. 18, 1970, at 1, col. 1 (city ed.); New York Times, Apr. 25, 1970, at 3, col. 1 (city ed.); But see New York Times, Apr. 23, 1970, at 5, col. 3 (city ed.), announcing the formation by the Cambodian government of a "Commission responsible for the safety of all foreigners. * * * *Ibid.*"

²⁰ For a discussion of the legal issues raised in the Vietnam War and whether the North Vietnamese use of force against South Vietnam violates article 2(4) of the charter see 1 and II, R. Falk (ed.), *The Vietnam War and International Law* (1968 and 1969).

²¹ But see R. Randle, note 2 above, at 414-15.

²² For a general discussion of the customary law of non-intervention see Moore, note 1 above, at 242-46, 315-32.

²³ G. A. Res. 2131, 20 U.N. GAOR supp. 14, at 11-12, U.N. Doc. A/6014 (1965).

²⁴ See G. Schwarzenberger, *A Manual of International Law* 218 (5th ed. 1967); J. Stone, *Legal Controls of International Conflict* 382 (1959). See also M. Greenspan, *The Modern Law of Land Warfare* 540 (1959); Note, "International Law and Military Operations Against Insurgents in Neutral Territory," 68 Col. Law Rev. 1127, 1142-46 (1968).

of Cambodian and non-Cambodian spokesman recognizing Cambodian neutrality.²⁵ The duties of a neutral include obligations to prevent belligerents from transporting troops or supplies across neutral territory and to prevent neutral territory from being used for base camps, munitions factories, supply depots, training facilities, communications networks, or staging areas for attack. Belligerent troops seeking asylum must be disarmed and interned for the duration of the conflict.²⁶ These obligations do not require a neutral to engage in impossible political or military efforts but only to employ "due diligence" or the "means at their disposal" to prevent belligerent violations.²⁷ Though the Sihanouk government seems sometimes to have cooperated with North Vietnamese and Vietcong forces to the point of violating Cambodian neutrality, the extremely precarious military and political posture of Cambodia should certainly be taken into account in assessing Sihanouk's actions.²⁸ In any event, at least since February of this year first the Sihanouk and then the Lon Nol government seemed to be genuinely engaged in attempting to prevent North Vietnamese and Vietcong violations of Cambodian neutrality.

With respect to Cambodian rights to defend its political and territorial integrity, Cambodia would seem to have the option pursuant to both Article 51 of the United Nations Charter and the Geneva Accords to request foreign assistance in defense against an armed attack. The sustained North Vietnamese and Vietcong attacks on Cambodian forces during the last several months, and the military occupation of sizeable areas of Cambodian territory from which Cambodian officials have been ousted certainly constitute an "armed attack" within the meaning of Article 51 of the Charter, and a "security threat" within the meaning of Article Seven of the Agreement on the Cessation of Hostilities in Cambodia. As such, Cambodia may lawfully request external assistance for its defense.

It should also be pointed out that Cambodia has an obligation under international law to protect ethnic Vietnamese residing in Cambodia. A deliberate governmental policy aimed at killing ethnic Vietnamese civilians residing in Cambodia would violate the Convention on the Prevention and Punishment of the Crime of Genocide, in force since 1951.²⁹ There is some evidence that the deaths of large numbers of Vietnamese civilians in Cambodia in April may have resulted from a Cambodian governmental policy, if not of commission at least of omission.³⁰ Any such policy would violate the Genocide Convention.

²⁵ See, e.g., the declaration of the Royal Government of Cambodia of May 29, 1955 in R. Randle, note 2 above, at 489.

²⁶ See generally on the duties of a neutral state E. Castrén, *The Present Law of War and Neutrality* 459, 470-488 (1954); L. Oppenheim, *International Law* 687-726 (7th ed. Lauterpacht 1952); M. McDougal and F. Feliciano, *Law and Minimum World Public Order* 436-469 (1961); G. Schwarzenberger, note 24 above, at 219-226.

²⁷ See E. Castrén, note 26 above, at 442; M. Greenspan, note 24 above, at 537-38; III C. Hyde, *International Law Chiefly as Interpreted and Applied By the United States* 2344 (1945); L. Oppenheim, note 26 above, at 757-58; J. Stone, note 24 above, at 391. Greenspan says: "the practice of the two world wars appears to indicate that a small neutral state is not at fault for failure to offer resistance to the invasion of its territory, where such resistance would be hopeless." M. Greenspan, note 24 above, at 537.

²⁸ One writer points out: "[I]t has been suggested by a student of Cambodian foreign policy that Prince Sihanouk believed that the continued independence of his state depended upon entering into a *modus vivendi* with the Chinese People's Republic and the Democratic Republic of Vietnam. At present, Cambodia is threatened by a Communist inspired insurgency; the consequence probably would have been far worse for the Cambodian government had impartiality been maintained throughout the war in Vietnam." Note, note 24 above, at 1145.

²⁹ 78 U.N.T.S. 277 (1951). See generally McDougal and Arens, "The Genocide Convention and the Constitution," 3 Vand. Law Rev. 683 (1950).

³⁰ See the *New York Times* articles, note 19 above.

C. The Lawfulness of North Vietnamese and Vietcong Activities in Cambodia

Whether incident to operations in Vietnam or an internal conflict in Cambodia, North Vietnamese and Vietcong military activities in Cambodia are unlawful.

If North Vietnamese and Vietcong activities are sought to be justified as incident to hostilities in South Vietnam, they violate both the Geneva Accords and the customary international law of neutrality, whether or not North Vietnamese claims of acting in defense in the Vietnam War are accepted. Thus, North Vietnam agreed pursuant to Article Four of the Cambodian Cease-fire Agreement and Article Twelve of the Final Declaration to withdraw her forces from Cambodia and to respect the sovereignty and territorial integrity of Cambodia. And pursuant to the customary law of neutrality, it is unlawful for a belligerent to violate neutral territory by using it for transportation of military forces or supplies, the establishment of staging areas for attack, or the establishment of training, command, communication, or supply facilities.³¹ Such violations may amount to aggression against the neutral giving rise to a corresponding right of defense. As McDougal and Feliciano put it :

By violating a neutral state, an aggressor-belligerent may compound its offense and commit a new and separate act of aggression. In such situations, the permission of self-defense becomes available to the target neutral and the whole panoply of sanctioning measures contemplated in the United Nations Charter becomes relevant.³²

Some scholars support a right of a belligerent state to take preventive action to forestall an impending occupation of a neutral state by enemy belligerents.³³ In view of Sihanouk's jealous guarding of Cambodian neutrality, his lack of even formal diplomatic relations with the United States or South Vietnam, and the total lack of factual basis for the claim, any North Vietnamese claim to this effect would seem considerably more far-fetched than the German claim rejected by the Nuremberg tribunal that the German invasion of Norway was justifiable preventive action.³⁴

It may also be urged that the law of neutrality has been modified by the Charter to permit belligerents who are acting in defense to violate neutral territory when necessary for effective defense. Even aside from the difficulty in characterizing North Vietnamese activities in South Vietnam and Cambodia as lawful defense, however, any such theory would work dangerously to expand permissible areas of conflict. At least in the absence of an authoritative community determination pursuant to Chapter VII of the Charter, such a theory would add yet another technique of conflict expansion through self-serving claims subject to little factual verification. Community policies for minimization of conflict suggest that it is important to preserve the requirement of prior or immediate threat of belligerent use of neutral territory as at least a minimum prerequisite for lawful belligerent ac-

³¹ See generally on the duties of a belligerent toward neutral states E. Castrén, note 26 above, at 440-42; M. Greenspan, note 24 above, at 534; C. Hyde, note 27 above, at 2336-2344; L. Oppenheim, note 26 above, at 690.

³² M. McDougal and F. Feliciano, note 26 above, at 404.

³³ See M. Greenspan, note 24 above, at 539-40; L. Oppenheim, note 26 above, at 698. But see C. Hyde, note 27 above, at 2341.

³⁴ See M. Greenspan, note 24 above, at 539.

tivities in neutral territory. Though the Charter may increase the customary law requirements for lawful belligerent activities on neutral territory it seems doubtful that it should decrease those requirements. For these reasons, most scholars seem to have rejected arguments that the Charter has eliminated the law of neutrality applicable to belligerent activities on neutral territory.³⁵

If North Vietnamese and Vietcong military activities are sought to be justified as participation in an internal conflict in Cambodia, such activities would violate both the Geneva Accords and the customary international law of non-intervention even if the internal conflict characterization were accepted. Pursuant to Article Twelve of the Final Declaration of the Geneva Conference North Vietnam undertook "to respect * * * the territorial integrity * * * [of Cambodia] and to refrain from any interference in * * * [its] internal affairs." With respect to the customary law of non-intervention, the majority view today seems to support a rule prohibiting external intervention in civil strife absent some prior foreign intervention on behalf of insurgents.³⁶ This rule is reflected in the 1965 General Assembly Declaration on Inadmissibility of Intervention which provides that: "* * * [N]o State shall * * * assist * * * armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State * * *." ³⁷ Thus, even if the claim were accepted that North Vietnamese and Vietcong forces were assisting the Sihanouk government at its invitation and that that government was the widely recognized government of Cambodia,³⁸ North Vietnamese and Vietcong intervention in the internal strife between the Lon Nol and Sihanouk governments would be unlawful absent prior external intervention on behalf of the Lon Nol government. The reality seems to be, however, that the fighting in Cambodia is principally between Cambodians on the one hand and North Vietnamese-Vietcong on the other. At least at this stage in the fighting few Cambodians seem to be fighting with the North Vietnamese forces and the situation seems more closely to resemble an external armed attack than intervention in an internal conflict. As such, North Vietnamese and Vietcong military actions against the Lon Nol government are most appropriately characterized as a violation of Article 2(4) of the Charter.

It is also relevant in appraising the North Vietnamese—Vietcong legal position in Cambodia that far from pursuing peaceful settlement pursuant to Article 33 of the Charter or reporting military measures to the Security Council pursuant to Article 51 of the Charter they have consistently denied even the presence of any North Vietnamese or Vietcong forces in Cambodia—surely a monumental credibility gap.³⁹

³⁵ See authorities cited note 24 above. One scholar writes: "The thesis that under the pact and charter the neutral state has a duty to assist the victim of aggression is tenable only if there exists a set of standards which members of an international tribunal can apply impartially, regardless of their ideological inclinations to determine which side has in fact struck the first blow." Note, note 24 above, at 1144.

³⁶ See Moore, note 1 above, at 316–20, 333–39.

³⁷ G. A. Res. 2131, 20 U.N. GAOR, supp. 14, at 11–12, U. N. Doc. A/6014 (1965).

³⁸ According to the *New York Times*, on April 24 the Soviet Union issued a statement in which it seemed * * * to indicate that it recognized the new government [Lon Nol government] as legal—if not to the Soviet Union's liking." *New York Times*, Apr. 25, 1970, at 4, col. 4 (city ed.).

³⁹ "Neither the North Vietnamese nor the Vietcong have ever officially acknowledged that they have troops in Cambodia." *N.Y. Times*, March 17, 1970, at 14, col. 8 (city ed.).

D. The Lawfulness of United States and South Vietnamese Activities in Cambodia

United States and South Vietnamese activities in Cambodia present two major claims. They are that military activities in Cambodia are lawful defensive measures incident to the defense of South Vietnam and that some such activities are lawful defensive measures incident to the defense of Cambodia. Some South Vietnamese activities in rescuing ethnic Vietnamese residing in Cambodia may, in view of the widespread killing of Vietnamese civilians by Cambodians, also raise a claim of humanitarian intervention.

1. *Activities incident to the defense of South Vietnam.*—For at least two years North Vietnamese and Vietcong military units have made major use of Cambodian border areas in support of their military operations in South Vietnam. Their military activities in Cambodia have included transportation of combatants and supplies, construction of command, communication, training and supply facilities, and use of Cambodian territory for launching attacks on targets within South Vietnam. Such activities have been substantial and continued and are not mere isolated or sporadic occurrences. Prior to the United States and South Vietnamese intercession the government of Cambodia was unable to effectively prevent these North Vietnamese and Vietcong activities in Cambodia. In fact, it is evident from *New York Times* accounts of Cambodian military efforts that far from effectively limiting use of the sanctuaries, the military situation throughout April was steadily deteriorating for the Cambodian government.⁴⁰ By April 20 the Cambodian army was fighting North Vietnamese within fifteen miles of Phnom Penh, the capital of Cambodia.⁴¹ And by the end of the month a Cambodian appeal to the Security Council had gone unanswered and Peking, Hanoi and Moscow had rejected an Asian nation initiative for talks on preserving Cambodian neutrality.⁴² The possibility of effective Cambodian control of North Vietnamese and Vietcong use of Cambodian territory incident to activities in South Vietnam seemed by the end of April remote.

On April 30, large scale United States and South Vietnamese military operations were begun in the border regions of Cambodia. The principal purpose of the operations was announced as clearing out the North Vietnamese and Vietcong border sanctuaries.⁴³ Through an initial statement from a Cambodian spokesman indicated that "the Cambodian Government as a neutral government cannot approve foreign intervention,"⁴⁴ the overall position of the Cambodian government seems to have been one of tacit consent tinged with concern lest favoritism of one side lead to loss of neutrality. Later statements of the Lon Nol government have indicated at least non-opposition to the United States and South Vietnamese actions.⁴⁵ United States combat operations in Cambodia seem for the most part to have been limited to a self-imposed 21 mile depth along the Cambodian border. Ground combat operations even within this region were announced to be subject to an eight week deadline for withdrawal of American troops

⁴⁰ See the *New York Times* articles, note 13 above.

⁴¹ *N.Y. Times*, April 21, 1970, at 1, col. 6 (city ed.).

⁴² See *N.Y. Times*, April 27, 1970, at 3, col. 5 (city ed.) (Peking and Hanoi); *N.Y. Times*, April 28, 1970, at 1, col. 8 (city ed.). (Moscow).

⁴³ See President Nixon's Address to the Nation, *N.Y. Times*, May 1, 1970, at 2, col. 1 (city ed.).

⁴⁴ See the statement by John R. Stevenson, note 8 above, at 5 n. 8.

⁴⁵ See the statement by John R. Stevenson, note 8 above, at 5 n. 8.

from Cambodia. South Vietnamese operations have been more sweeping and apparently are not limited by the same deadline.

The principal legal issue presented by these United States and South Vietnamese military operations in Cambodian border regions is the scope of defensive rights under the Charter against belligerent operations in neutral territory. It is well established in the customary international law of the rights and duties of belligerents toward neutral states that a belligerent power may take action to end serious violations of neutral territory by an opposing belligerent when the neutral power is unable to prevent belligerent use of its territory and when the action is necessary and proportional to lawful defensive objectives. Scholars endorsing this view include, among others, Professors McDougal and Feliciano,⁴⁶ Greenspan,⁴⁷ Hyde,⁴⁸ Castrén,⁴⁹ and Lauterpacht.⁵⁰ Thus Professors McDougal and Feliciano point out:

Where a nonparticipant is unable or unwilling to prevent one belligerent from carrying on hostile activities within neutral territory, or from utilizing such territory as a "base of operations," the opposing belligerent, seriously disadvantaged by neutral failure or weakness, becomes authorized to enter neutral territory and there to take the necessary measures to counter and stop the hostile activities.⁵¹

Similarly, Greenspan states:

Should a violation of neutral territory occur through the complaisance of the neutral state, or because of its inability, through weakness or otherwise, to resist such violation, then a belligerent which is prejudiced by the violation is entitled to take measures to redress the situation, including, if necessary, attack on enemy forces in the neutral territory.⁵²

Charles Cheney Hyde writes:

The obligation resting upon the belligerent with respect to the neutral is not of unlimited scope. Circumstances may arise when the belligerent is excused from disregarding the prohibition. If a neutral possesses neither the power nor disposition to check warlike activities within its own domain, the belligerent that in consequence is injured or threatened with immediate injury would appear to be free from the normal obligation to refrain from the commission of hostile acts therein.⁵³

And Professor Castrén says:

A belligerent may not violate the territorial integrity of a neutral State merely because the other belligerent side has done so. Nevertheless, the situation is different if the neutral State has not taken countermeasures, or if the enemy, in spite of the efforts of the neutral State, has succeeded in acquiring a *permanent*

⁴⁶ M. McDougal and F. Feliciano, note 26 above, at 76, 406-07, 568.

⁴⁷ M. Greenspan, note 24 above, at 538.

⁴⁸ C. Hyde, note 27 above, at 2337-2341.

⁴⁹ E. Castrén, note 26 above, at 442, 462-63.

⁵⁰ L. Oppenheim (Lauterpacht ed.), note 26 above, at 695 n.1, 698. Lauterpacht adopts the view that:

"Normally, diplomatic representations and a claim for compensation are the proper remedy for any disregard of neutral duties of this nature. However, circumstances may arise in which subsequent redress by the neutral must, in *natura rerum*, be wholly inadequate and in which the aggrieved belligerent must, therefore, be held to be justified in resorting to self-help."

Ibid. at 695 n.1. See also the excellent note, "International Law and Military Operations Against Insurgents in Neutral Territory," note 24 above. The author takes the position that:

"Defensive measures may be necessary where neutral territory is used as a sanctuary for tactical retreat and a base of operations for repeated raids. This is the basis on which the United States has sought the right to pursue the Viet Cong into Cambodia."

Ibid. at 1129.

"Defensive actions which infringe the sovereignty of a neutral state should be justifiable under international law . . . if they are necessary to end repeated raids from a neutral sanctuary, or if they are required to protect the safety of troops under actual attack."

Ibid. at 1138.

⁵¹ M. McDougal and F. Feliciano, note 26 above, at 568.

⁵² M. Greenspan, note 24 above, at 538.

⁵³ C. Hyde, note 27 above, at 2337-38.

stronghold in its territory, in which case the other belligerent side is entitled to drive off the violator from there. A belligerent is further not bound to tolerate the *continual* passage of enemy military transports through neutral territory.⁵⁴

For the most part, the customary international law of neutrality seems as applicable after the United Nations Charter as before. In fact, the McDougal-Feliciano, Greenspan and Castrén statements just quoted were all written after the Charter. Though the Charter introduces additional restrictions on the use of force, nothing in the Charter would seem to cut against the strong community policies for isolating and minimizing coercion which are served by the law of neutrality, at least in the absence of a Security Council decision to take measures under Chapter VII of the Charter. The Charter, however, does introduce restrictions on the use of force, which to the extent that they were not already subsumed under customary international law, seem additionally applicable to appraising defense rights against belligerent operations in neutral territory. Adopting a restrictive view of defense rights under the Charter, the Charter requires that the use of force must be a defensive response to an armed attack and must be necessary and proportional to lawful defensive objectives.⁵⁵ As applied to defense rights against belligerent operations in neutral territory this would seem to require that the use of force against belligerent operations in neutral territory should be necessary and proportional to lawful defense objectives. Though consent of the neutral state may be one factor in appraising the exercise of defense rights against belligerent operations in neutral territory, it does not seem required either by the customary international law of neutrality or by the additional Charter requirements, provided other applicable criteria are met.

Necessity and proportionality are shorthand for community policies restricting coercion to situations where there is no reasonable alternative to the use of force for protection of fundamental values and restricting the responding use of force to that reasonably necessary for defense of the threatened values.⁵⁶ In the somewhat overly restrictive language of the famous *Caroline* case there must be shown a "necessity of self defense, instant, overwhelming, leaving no choice of means and no moment for deliberation."⁵⁷ And as McDougal and Feliciano indicate, responding coercion must:

be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defense. . . . by compelling the opposing participant to terminate the condition which necessitates responsive coercion.⁵⁸

As applied to the scope of defense rights against belligerent operations in neutral territory, necessity and proportionality would also seem to subsume community policies for isolating conflict by restricting permissible areas of belligerent operations as well as community policies permitting the use of force reasonably necessary for the defense of major values. As such, the level of belligerent activity on neutral territory, the seriousness of the threat posed by that activity for the protection of major values, the level of control of such activity

⁵⁴ E. Castrén, note 26 above, at 462-63.

⁵⁵ Some scholars would urge a less restrictive interpretation not limiting the right of self-defense to self-defense to that of Article 51. See, e.g., D. Bowett, *Self-Defense in International Law* 184-193 (1958); M. McDougal and F. Feliciano, note 26 above, at 233-241 (1961); J. Stone, *Aggression and World Order* 92-101 (1958).

⁵⁶ See M. McDougal and F. Feliciano, note 26 above, at 217-218, 229-244, 259.

⁵⁷ See M. McDougal and F. Feliciano, note 26 above, at 217.

⁵⁸ M. McDougal and F. Feliciano, note 26 above, at 242.

by the neutral state, and the scope of the responding coercion are all important features in assessing the lawfulness of defensive rights against belligerent operations in neutral territory.

The United States and South Vietnamese military operations aimed at the North Vietnamese base complexes in Cambodian border areas seem adequately to have complied with the relevant international law standards. The level of North Vietnamese and Vietcong activity on Cambodian territory was substantial and continuing. Activities in Cambodia included elaborate base camps, repeated use of staging areas for launching large scale attacks on targets in South Vietnam, and a major logistics and communications network. At the time of the intercession the number of North Vietnamese and Vietcong personnel operating in Cambodia may have been forty thousand or more. In short, the level of belligerent activity in Cambodia was no occasional, low level, or merely threatened as was alleged in the German invasion of Norway but was an existing major adjunct to North Vietnamese belligerent operations within South Vietnam. The existence of such large scale operations in neighboring Cambodian border regions, which in some areas were as close as thirty five or forty miles from Saigon, posed a continuing threat to the effective defense of South Vietnam. Moreover, even though the security threat had existed for some time, if North Vietnamese and Vietcong forces succeeded in military operations directed against the Cambodian government, as in late April it looked like they might, it could be expected that the security threat to South Vietnam would increase.

With respect to the level of control of the neutral state, Cambodian officials had for the most part been driven out of the contested border areas and by all accounts the government forces were sorely pressed to defend Phnom Penh and the provincial capitals, much less to take effective action against the sanctuaries. In this context, the United States and South Vietnamese response seems of a scope reasonably related to promptly achieve permissible defensive objectives. The coordinated action was aimed at the North Vietnamese and Vietcong base areas and was not a punitive reprisal raid directed at the host state, as has been true of some Israeli raids in reprisal against guerrilla activities emanating from Jordanian and Lebanese territory.⁵⁹ At least United States forces placed a self-imposed 21 mile geographical limit on the invasion of Cambodian territory and an eight week time limit for the withdrawal of combat units. It also seems relevant in appraising the action that Cambodia did not formally protest the presence of United States or South Vietnamese troops as on April 22 she had protested the presence of North Vietnamese and Vietcong troops. Although there were some Cambodian statements critical of the joint operation, on balance it seems to have received at least the tacit consent of the Cambodian government. This feature of tacit consent is another factor which makes the case stronger than Israeli action against guerrilla complexes in Jordan, Lebanon and Syria, or French action in the Algerian War against Tunisian frontier areas.

Military operations within Cambodia, as within South Vietnam, must be carried out in a manner that is consistent with the laws of war.

⁵⁹ See generally Falk, "The Beirut Raid and the International Law of Retaliation," 63 A.J.I.L. 415 (1969); Blum, "The Beirut Raid and the International Double Standard: A Reply to Professor Richard A. Falk," 64 A.J.I.L. 73 (1970). See also the exchange of correspondence between Professor Julius Stone and Professor Richard A. Falk, 64 A.J.I.L. 161-63 (1970).

In fact, they should be carried out with a sensitivity which goes beyond the present inadequate protection accorded non-combatants and prisoners of war in internal conflicts. Past military operations within Vietnam have demonstrated that this is not always the case and that the military has a better job to do both in implementing existing regulations and in evaluating their adequacy for internal conflicts.⁶⁰

2. *Activities incident to the defense of Cambodia.*—The level of North Vietnamese attacks on Cambodian military forces and the virtual occupation of large areas of Cambodian territory over Cambodian objection seem at least by late April to have constituted an armed attack on Cambodia justifying individual and collective defense under Article 51 of the Charter. To meet this situation, on April 14 Cambodia made an appeal to the United States and other nations for arms and military supplies.⁶¹ On April 20 Cambodia further requested assistance in the form of ethnic Cambodian mercenaries fighting in South Vietnam, and on April 22 Cambodia complained to the Security Council seeking assistance from all countries in fighting North Vietnamese and Vietcong forces. Subsequent to the joint United States-South Vietnamese intercession in Cambodia on April 30, the Cambodian government negotiated military aid agreements with Thailand⁶² and South Vietnam.⁶³ The agreement with South Vietnam provides that South Vietnamese military forces:

which had come with the agreement of the Cambodian Government to help Cambodian troops to drive out the Vietcong and North Vietnamese forces, will withdraw from Cambodia when their task is completed.⁶⁴

Although prior to the April 30th intercession Cambodia had not requested United States combat troops to assist in meeting the North Vietnamese and Vietcong attack, at least not openly, the worsening military position of the Cambodian forces seemed to have been one motivating factor in the United States action against the border sanctuaries. Thus, in his April 30 address to the nation President Nixon called attention to the North Vietnamese attacks on Cambodian forces and the Cambodian request to the United States and other nations for assistance. The general United States deemphasis of objectives concerning the defense of Cambodia seemed to result primarily from a desire to disturb the neutrality of Cambodia as little as possible by the action and to reemphasize the Nixon doctrine that the United States would provide assistance but not American combat forces for the long range defense of Cambodia. In a statement on May 5 in which he at least tacitly accepted the United States action, Lon Nol seemed to take an intermediate view of the objectives of the United States action. He referred to the action as "aid . . . in the defense of the neutrality of Cambodia violated by the North Vietnamese." He also said that "the Government of Cambodia . . . wishes to announce that it appreciates the views of President Nixon in his message of April 30 and expresses to him its gratitude."⁶⁵

In view of the magnitude of the North Vietnamese and Vietcong attacks on Cambodian forces and the Cambodian acceptance of the

⁶⁰ See generally Moore, "The Control of Foreign Intervention in Internal Conflict," 9 Va. J. Int'l Law 205, 309-310 (1969).

⁶¹ N.Y. Times, April 23, 1970, at 1, col. 8 and 5, col. 3 (city ed.).

⁶² See N.Y. Times, June 2, 1970, at 1, col. 5 (city ed.); N.Y. Times, June 3, 1970, at 1, col. 5 (city ed.).

⁶³ See N.Y. Times, May 28, 1970, at 1, col. 2 (city ed.).

⁶⁴ N.Y. Times, May 28, 1970, at 1, col. 2 (city ed.).

⁶⁵ See the statement by John R. Stevenson, note 8 above, at 5 n.8.

April 30 intercession, it would seem that the United States and South Vietnamese military actions in Cambodia could also be characterized as lawful measures of collective defense of Cambodia.

The minimal involvement of native Cambodians on the side of the North Vietnamese forces suggests that a characterization of the Cambodian conflict as "civil strife" is less appropriate than a characterization as "external armed attack." Even if the "civil strife" characterization were accepted, however, assistance to the Lon Nol government to offset the prior massive foreign intervention on behalf of the Sihanouk forces would, to the extent that the Lon Nol government is the widely recognized government of Cambodia, be lawful.

3. *Activities incident to the rescue of ethnic Vietnamese in Cambodia.*—Because of the large scale killings of ethnic Vietnamese residing in Cambodia, some of the South Vietnamese military operations in Cambodia aimed at evacuating ethnic Vietnamese refugees may have constituted permissible humanitarian intervention. The justification for humanitarian intervention, though, could only extend to operations principally concerned with evacuating refugees rather than those aimed at affecting authority structures in Cambodia. Since South Vietnamese military actions seem to be defensible on broader grounds there seems little point in focusing on the possible claim of humanitarian intervention other than to reassert that the large scale killings of ethnic Vietnamese in Cambodia is another example of the need for an unambiguous right of humanitarian intervention.⁶⁶

4. *Real-world Cambodia: A closer look at context.*—When the United States and South Vietnam interceded in Cambodia on April 30, the factual basis seemed to be present for both the exercise of collective defense in defense of Cambodia and the exercise of defensive rights aimed at belligerent activities in a neutral state. Not surprisingly, objectives relating both to the defense of Cambodia and the destruction of North Vietnamese base areas in Cambodia seemed to have influenced the operation. In fact, Cambodian defense and the possibility of intensified belligerent activities directed against South Vietnam are so interrelated that it seems probable that the precarious military position of the Cambodian government was a principal triggering event of the operation. The existence of a North Vietnamese armed attack on Cambodia as well as North Vietnamese use of Cambodian territory as a base for belligerent operations sets apart the Cambodian case as a much stronger case for action directed against belligerent operations in a third state than prior instances such as the Caroline affair between Britain and the United States, French action against the Tunisian frontier village of Sakiet Sidi Youssef during the Algerian War,⁶⁷ or even Israeli raids against guerrilla bases in Jordan, Lebanon and Syria (which should be distinguished from Israeli reprisal raids directed against the Jordanian and Lebanese governments). Other distinctions between the Cambodian case and these or other instances of actions directed against belligerent operations in a third state may also be relevant to legal appraisal. Such distinctions include the presence or absence of consent of the host state, the lawfulness of the defensive effort (the anti-colonial context of the Algerian War makes the

⁶⁶ See generally, Lillich, "Forcible Self-Help by States to Protect Human Rights," 53 Iowa Law Rev. 325 (1967); Moore, note 60 above, at 261-64.

⁶⁷ See M. Clark, *Algeria In Turmoil—The Rebellion: Its Causes, Its Effects, Its Future* 363-66. (1960).

French effort suspect), the scope and intensity of belligerent activities in the host state, and the proportionality of the coercive response. It is instructive in this regard to compare the Cambodian situation with that of the Caroline affair, which spawned the most frequently quoted test of necessity. The Caroline affair took place during the Canadian rebellion of 1838. As William Edward Hall describes it in his *Treatise On International Law*:

A body of insurgents collected to the number of several hundreds in American territory, and after obtaining small arms and twelve guns by force from American arsenals, seized an island at Niagara within the American frontier, from which shots were fired into Canada, and where preparations were made to cross into British territory by means of a steamer called the Caroline. To prevent the crossing from being effected, the Caroline was boarded by an English force while at her moorings within American waters, and was sent adrift down the falls of Niagara.⁶⁸

British actions in the Caroline case were not in support of the defense of the United States against a major external armed attack, did not take place with the tacit consent of the United States government and were directed against sporadic actions of "several hundreds" of insurgents rather than the long continued belligerent activities of as many as 40,000 combat troops of a foreign nation, all features present in the Cambodian case. Nevertheless, Professor Hall goes on to suggest that even the English response in the Caroline case met the "somewhat too emphatic language" of the Caroline test of necessity.⁶⁹ In assessing the lawfulness of all of these instances of action directed against belligerent activities emanating from the territory of a third state a detailed examination of necessity and proportionality in context would seem the most reliable guide. The context of the Cambodian case, particularly the dual basis for the exercise of defensive rights in Cambodia, would seem a strong basis for lawfulness.⁷⁰

5. *Additional obligations under the United Nations Charter.*—Measures taken by members in the exercise of defensive rights must, pursuant to Article 51, be "immediately reported to the Security Council . . ." The Cambodian operation with South Vietnam was reported by the United States to the Security Council on May 5th.⁷¹ This reporting, at least in substance if not in speed, seems to comply with the Charter requirement.

The Charter does not require that defensive action taken pursuant to Article 51 be first submitted to the Security Council for approval. Nevertheless, for a number of reasons it would have seemed desirable to have raised the North Vietnamese and Vietcong attacks on Cambodia in the Security Council. Perhaps the most important reason is that every time the Security Council is shunted aside and not encouraged to assume responsibility for dealing with a threat to the peace the erosion of United Nations utility and authority continues. But even from a *realpolitik* perspective, the Security Council might have been effectively used as a forum to expose the rather blatant North Vietnamese and Vietcong activities in Cambodia, much as it was used during the Pueblo crisis. The importance of such appeals to authority, both in terms of international and domestic audiences, should not be

⁶⁸ W. Hall, *A Treatise on International Law* 246 (2d ed. 1884).

⁶⁹ *Ibid* at 246-47.

⁷⁰ For a statement critical of the lawfulness of the Cambodian Intercession see Edwards, "The Cambodian Invasion Violates International Law," Cong. Rec. E4551 (May 21, 1970).

⁷¹ U.N. Doc. S/9781 (May 5, 1970). See Edwards, note 70 above, at E4552.

underestimated. Possible drawbacks from raising the Cambodian issue in the Security Council, such as the possibility of a challenge to the credentials of the Lon Nol government or the possibility of forcing a more militant Soviet stand, do not seem sufficiently serious to outweigh the reasons for using the Security Council.

II. THE CONSTITUTIONAL ISSUES

President Nixon's decision to intercede in Cambodia and congressional reactions to it present two principal constitutional issues. First, the constitutional authority for the presidential decision to intercede in Cambodia and second, the constitutional authority for congressional restraints on military operations in Indochina.⁷²

A. The Constitutional Authority for the Presidential Decision to Intercede in Cambodia

The principal sources of presidential authority for the commitment of troops to combat abroad are congressional authorization and the power of the President as Commander-in-Chief. Though Congress was not consulted on the decision to intercede in Cambodia, the language of the Southeast Asia Resolution lends some support to presidential authority. The Southeast Asia Resolution, passed by Congress on August 7, 1964, provides that:

Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression. . . . the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.⁷³

Since Cambodia, like Vietnam, is a protocol state of SEATO, the language of the Resolution would seem to authorize presidential decisions to take military action necessary to the defense of Vietnam or in the event of a request for assistance from Cambodia, military action necessary to the defense of Cambodia. Moreover, there is some evidence from its legislative history that the Resolution was understood at the time of its passage to include action in defense of Cambodia. Thus, in his address to Congress on August 5th requesting the Southeast Asia Resolution President Johnson specifically asked for a resolution broad enough to "assist nations covered by the SEATO treaty."⁷⁴ And in an exchange between Senators Cooper and Fulbright on the floor of the Senate during the passage of the Resolution it was said:

⁷² See generally on the merits of the war power controversy Kurland, "The Impotence of Retelence," 1968, Duke Law J. 619; Moore, "The National Executive and the Use of the Armed Forces Abroad," 21 Naval War College Review 28 (1969); Reveley, "Presidential War-Making: Constitutional Prerogative or Usurpation?," 55 Va. Law Rev. 1243 (1969); Velvel, "The War in Viet Nam: Unconstitutional, Justiciable and Jurisdictionally Attackable," 16 Kansas Law Rev. 449 (1968); Francis D. Wormuth, "The Vietnam War: The President v. The Constitution" (An Occasional Paper of the Center for the Study of Democratic Institutions, 1968); Note, "Congress, The President, and the Power to Commit Forces to Combat," 81 Harv. L. Rev. 1771 (1968). See also the memorandums prepared by Yale law students and professors "Indochina: The Constitutional Crisis," 116 Cong. Rec. (No. 76, May 13 1970), and "Indochina: The Constitutional Crisis—Part II," 116 Cong. Rec. (No. 82, May 21, 1970); and the proceedings of the Symposium on "The Constitution and the Use of Military Force Abroad" held at the University of Virginia Feb. 28–March 1, 1969 and to be published in Volume 10 of the *Virginia Journal of International Law*.

⁷³ 78 Stat. 384 (Approved Aug. 10, 1964).

⁷⁴ President's Message to Congress, August 5, 1964, in Background Information Relating to Southeast Asia and Vietnam, Committee on Foreign Relations, United States Senate 122, at 124 (Rev. ed. Comm. Print June 16, 1965).

Mr. COOPER. . . . Does the Senator consider that in enacting this resolution we are satisfying that requirement [the constitutional processes requirement] of Article IV of the Southeast Asia Collective Defense Treaty? In other words, are we now giving the President advance authority to take whatever action he may deem necessary respecting South Vietnam and its defense, *or with respect to the defense of an other country included in the treaty?* [emphasis added].

Mr. FULBRIGHT. I think that is correct.

Mr. COOPER. Then, looking ahead, if the President decided that it was necessary to use such force as could lead into war, we will give that authority by this resolution?

Mr. FULBRIGHT. That is the way I would interpret it. If a situation later developed in which we thought the approval should be withdrawn, it could be withdrawn by concurrent resolution. . . .⁷⁵

Though Cambodia may not have been on many of the congressional minds at the time of passage of the Southeast Asia Resolution, Vietnam certainly was.⁷⁶ Thus, since the defense needs of South Vietnam and the American forces there are the principal reasons given by President Nixon for the Cambodian intercession, the Southeast Asia Resolution provides a stronger basis for presidential action than if a new decision to commit American combat forces to the defense of Cambodia were the sole issue.

The Southeast Asia Resolution has been criticized as hurriedly rushed through Congress and as predicated on an exaggerated attack on American destroyers in the Gulf of Tonkin. Though the abbreviated debate during the passage of the resolution was a sorry exercise of congressional responsibility, the Resolution is nevertheless a valid exercise of the congressional war power. It is also relevant in considering congressional involvement that an amendment introduced by Senator Wayne Morse in March 1966 to repeal the Resolution was tabled in the Senate by a vote of 92 to 5.⁷⁷ In fact, according to the *New York Times* a resolution to reaffirm it would have easily passed.⁷⁸ Prior to the Cambodian decision a new effort to repeal the Resolution had begun but at the time of the action the resolution to repeal had only cleared the Senate Foreign Relations Committee.⁷⁹

A second basis for presidential authority to commit troops abroad is the power of the President as commander-in-chief. In unraveling the proper scope of the President's power as Commander-in-Chief it is helpful to distinguish the President's power to initially commit troops to combat abroad even when acting without congressional authorization from his power to make command decisions concerning areas of belligerency, weapons systems to be employed, or other tactical decisions incident to an otherwise constitutionally authorized conflict.

With respect to the first category of commander-in-chief powers, the record of the deliberations of the Constitutional Convention and a great deal of historical precedent during the early years of the Republic suggest that the framers intended the independent presidential warmaking power to be narrowly circumscribed. In spite of this beginning, however, during the twentieth century there has been a substantial growth in the presidential power to commit troops abroad, culminating in President Truman's commitment of a quarter of a million

⁷⁵ 110 Cong. Rec. 18409-410 (1964).

⁷⁶ For a review of the congressional debates on the Southeast Asia Resolution and the constitutional issues concerning authority for the Vietnam War see Moore and Underwood, "The Lawfulness of United States Assistance to the Republic of Vietnam," 112 Cong. Rec. 14943, 14960-67, 14983-89 (daily ed. July 14, 1966).

⁷⁷ 112 Cong. Rec. 4226 (daily ed. March 1, 1966).

⁷⁸ N.Y. Times, March 2, 1966, at 1, col. 8 (city ed.).

⁷⁹ See "Fulbright Panel Votes to Repeal Tonkin Measure," N. Y. Times, April 11, 1970, at 1, col. 5 (city ed.).

troops to the Korean War. Though the trend may have gone too far in the direction of presidential power, 20th century experience and changed global conditions do suggest some independent role for the President in committing forces to combat abroad. Elsewhere I have suggested that the test might be one of commitment of regular combat units to sustained hostilities.⁸⁰

The parameters of the second category of commander-in-chief powers, tactical command decisions incident to an otherwise constitutionally authorized initial commitment to hostilities, are equally uncertain. It seems probable that a broad range of such decisions may be constitutionally taken by the President acting on his own authority and that some such decisions may be within the President's exclusive area of competence and thus not subject to congressional review. Though it may frequently be a mistake for a President concerned with a major tactical command decision not to take congressional leaders into his confidence, decisions in this category are nevertheless constitutionally within presidential authority. There is little authority as to the scope of the President's power to make tactical decisions, but my own view is that the decision to intercede in Cambodia was a tactical command decision concerning the conduct of congressionally authorized hostilities in Vietnam which at least in the absence of congressional disapproval may be constitutionally made by the President. The principal basis for this view is the limited nature of the Cambodian action both geographically and temporally and its close relation to the Vietnamization effort in support of American withdrawal. It is also supported, however, by the actions of past presidents. For example, President Roosevelt did not obtain formal congressional approval for the invasion of North Africa during World War II, and in World War I President Wilson armed American merchant ships despite congressional inaction on his request for congressional authorization.⁸¹

Taken together, the Southeast Asia Resolution and the President's independent authority as Commander-in-Chief seem to me to adequately support the constitutionality of President Nixon's decision to intercede in Cambodia.

B. The Constitutional Authority for Congressional Restraints on Military Operations in Indochina

The decision to intercede in Cambodia has given rise to a host of congressional initiatives intended to confine belligerent operations to certain areas within Indochina or to require termination of the American combat presence after a particular date. Proper resolution of claims concerning the power to terminate hostilities is unclear, but within some reasonable latitude it seems probable that the major congressional power to wage war should also carry with it a power to terminate war. First, the grant of the power to Congress to declare war by implication would seem to include a power to terminate war. And second, Congress is the most broadly based and democratically responsive branch of government and unless there is a strong functional reason such as secrecy, speed, or decisiveness which would suggest entrusting the power exclusively to the President, which seems not to be the case, Congress probably ought to be able to terminate as well as to commence hostilities. Congressional decisions which seek to limit presi-

⁸⁰ See Moore, note 72 above, at 32.

⁸¹ See Moore, note 72 above, at 34.

dential discretion to take particular tactical command decisions incident to a constitutionally authorized conflict, however, present a harder case. On the one hand, Congress is the most broadly based and democratically responsive branch. But on the other hand, tactical command decisions are those in which greater executive access to information and superior ability to respond quickly and decisively may suggest greater executive authority. Moreover, such decisions more clearly fall within the textual grant of power to the President as commander in chief. The problem, of course, is the present lack of policy responsive criteria for making the determination as to what kinds of decisions, if any, should be exclusively presidential. In the absence of such criteria, it seems fair to say that congressional authority to limit the power of the President as commander in chief to take tactical command decisions incident to a constitutionally authorized conflict is unclear. To the extent, then, that present congressional efforts are aimed at foreclosing tactical choices incident to the conduct of the Vietnam war, Congress may lack constitutional authority.

C. The Need for Congressional-Executive Cooperation on War-Peace Issues

The uncertainty of the division of the war powers between Congress and the President suggests a need for cooperation rather than conflict. The constitutional structure is inescapably one of interdependency. Though Congress has the major power over decisions to commit or withdraw forces from combat, the President can by design of foreign policy sometimes dictate the congressional action. Moreover, Congress seems to be largely dependent on the methods which the President chooses to wage or withdraw from conflict. And for his part, though the President has great power to diplomatically commit the nation and to control the course of constitutionally authorized hostilities, Congress has the substantial power of the purse and great power to mobilize public opinion against a course pursued by the President.

This interdependency suggests that the President should candidly inform Congress of developments affecting national security and that congressional leaders should be consulted prior to major military decisions even if they fall within the President's constitutional authority as Commander-in-Chief. Failure to inform congressional leaders prior to the Cambodian intercession involved a high cost in the authority of the action and in congressional disaffection from presidential initiatives. Constitutional authority is not an adequate substitute for congressional cooperation.

The interdependency between Congress and the President also suggests that Congress should be sensitive to the need for cooperation with the President. Under the pressures of global defense needs and the continuing cold-war, Congress in this century may have relinquished too much of its constitutional role in war-peace issues. Though it is a constitutional option open to Congress, the practice of ceding blanket advance authority to the President in resolutions such as the 1955 Formosa Resolution, the 1957 Middle East Resolution and the 1964 Southeast Asia Resolution may be an example where Congress went too far. Such resolutions run the dual risk of precluding meaningful congressional participation when events change and of proving an unreliable basis for congressional support when a Presi-

dent needs them. This is not to suggest that Congress should use only formal declarations of war, a suggestion which seems largely a red herring. Nor is it to suggest that in authorizing the commitment of forces abroad Congress should limit needed flexibility of the President. But it is to suggest that Congress should exercise its power to commit American blood and treasure to hostilities abroad with careful deliberation and awareness of context.

In its understandable interest in reassuming a greater role in war-peace decisions, Congress should not lose sight of the need to protect legitimate presidential authority. Though present constitutional outlines are hazy, careful delimitation of issues and exploration of the congressional and executive role with respect to each is the only guide to clarification. Constitutional issues concerning the war power include at least the following:

1. What authority does the President have acting on his own to commit troops to hostilities abroad?
2. When congressional authorization of the commitment of troops to hostilities abroad is required what form should it take?
3. What is the authority of Congress to terminate hostilities?
4. What is the scope of the President's authority as Commander-in-Chief to take tactical command decisions incident to a constitutionally authorized conflict?
5. What is the scope of congressional authority to place restrictions on the way in which a President conducts a constitutionally authorized conflict?

These issues raise different considerations; conclusions on one should not dictate conclusions on others. In light of the congressional initiatives to restrain the President in his conduct of the Vietnam War, it is particularly important that Congress should fully explore its authority to enact particular restraints and that where functional requirements suggest a greater presidential role that Congress should remain sensitive to that role.

III. INTERNATIONAL LAW AND THE FUNCTIONING OF THE NATIONAL SECURITY PROCESS

In the last few years a great deal of attention has been focused on the role actually played by international law in national security decisions.⁸² The results are frequently discouraging. It is surprising, then, that so little attention has been devoted to the role that international law ought to play in such decisions and how the national security process might be better structured to take it into account. In a recent article in the *Virginia Journal of International Law* I have urged that an international-legal perspective is an important perspective in national security decisions and that the present structure of the process is woefully inadequate for reliably bringing such perspectives to the attention of national decision-makers.⁸³ The Cambodian decision dramatically illustrates the continuing high cost of failing to structure an international-legal perspective into the national security process. Though the U.S. intercession in Cambodia was lawful, the ambiguity surrounding certain features of the operation, for

⁸² See, e.g., Scheinman and Wilkinson, *International Law and Political Crisis* (1968). The American Society of International Law currently has a Panel on the Role of International Law in Government Decision-Making in War-Peace Crises which has a number of thoughtful studies in process.

⁸³ Moore, note 60 above, at 310-14.

example the consent of the Cambodian government, contributed unnecessarily to domestic and international misunderstanding of the action. It seems to me that there were at least two options which were likely to be persuasively presented by someone focused on an international-legal perspective which might have strengthened the United States response. First, North Vietnamese and Vietcong attacks on and from Cambodia should have been vigorously protested by the United States in the Security Council during March or April. The Cambodian complaint to the Security Council on April 22 would have seemed a particularly opportune time to press a complaint in the Security Council.

The North Vietnamese belligerent use of neutral Cambodian territory and attacks on the Cambodian government presented about as clear a case of impermissible action as is ever possible in complex world order disputes. To ignore the North Vietnamese actions when there was no longer room for doubt as to the facts of their major role was to unnecessarily undercut both the Security Council and the United States authority position. Second, if adequate defense of the United States position in Vietnam nevertheless required the Cambodian operation, a prior understanding with Cambodia should have been obtained for public release at the time of the operation. Though concern has been expressed that such an agreement might have undercut the neutrality of Cambodia, it should have been possible to word it in such a way that neutrality was supported rather than compromised. Thus, Cambodia might have "recognized the right of the United States and South Vietnam to take defensive action against the unlawful belligerent activities of the North Vietnamese and Vietcong forces on neutral Cambodian territory." The agreement might also have emphasized that under international law it is not a breach of neutrality for a neutral state to use force against unlawful belligerent activities on its territory,⁸⁴ and that Cambodia had no intention of relinquishing its neutrality. Though such an agreement was not strictly required by international law, it would have both materially strengthened the United States position and the continuing neutrality of Cambodia. As a minor third point, the United States should have immediately reported its action to the Security Council instead of waiting 5 days. These suggestions are not put forth as grand new solutions but only to illustrate how an international-legal perspective might have been sensitive to a range of issues and options which could have improved the United States response to the situation. Had the proposed Cambodian intercession been illegal, of course, then an international-legal perspective might have been even more important in counselling restraint.

There is no real remedy to the lack of an international-legal perspective in the national security process other than increasing the national leaders' awareness of the importance of such a perspective. Institutional changes may help significantly, however, and I am more than ever convinced of the soundness of the earlier recommendation to upgrade the office of Legal Adviser of the Department of State to Under Secretary of State for International Legal Affairs, and to make

⁸⁴ See M. Greenspan, *The Modern Law of Land Warfare* 536-37, 584 (1959). Similarly, lawful actions by one belligerent directed against violations of neutral territory by another belligerent do not constitute hostilities against the neutral. See L. Oppenheim, *International Law* 685 (7th ed. Lauterpacht 1952).

the new Under Secretary a permanent *ex officio* member of the National Security Council. In the alternative, or perhaps in addition, the President should add to his staff an Assistant to the President for International Legal Affairs.⁸⁵ In John Stevenson, the present Legal Adviser of the Department of State, and Louis Sohn, the first Counselor in International Law of the Department of State, the Nixon administration has an extraordinary depth of talent attuned to an international-legal perspective. The challenge is to get them where the action is.

CONCLUSION

Though the decision to intercede in Cambodia was lawful both under international law and the United States Constitution, the functioning of the national security process in the Cambodian crisis indicates a need for greater sensitivity to the legal dimensions of security decisions. Several options which could have been pursued, particularly referral to the United Nations Security Council, do not seem to have been adequately considered. Similarly, failure to inform congressional leaders of the pending decision may have unnecessarily weakened the authority of the action. For international lawyers, the principal lesson of the Cambodian crisis may be that they have failed to convince national decision-makers that an international-legal perspective should be heard. If so, soul searching among international lawyers might better give way to a concerted effort to ensure that others practice what we preach.

⁸⁵ For an exploration of these and other suggestions for more systematically introducing an international-legal perspective into the national security process see Moore, note 60 above, at 310-14, 340-42.

THE VIETNAM WAR: THE PRESIDENT VERSUS THE CONSTITUTION*

(By Francis D. Wormuth, Professor of Political Science, University of Utah)

CHAPTER V: UNAUTHORIZED PRESIDENTIAL ACTIONS

The 1966 State Department memorandum attaches importance to the fact that "Since the Constitution was adopted there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior congressional authorization, starting with the 'undeclared war' with France (1798-1800)." These precedents are supposed to justify President Johnson's action in committing more than a half million troops in South Vietnam and attacking North Vietnam.

Three collections of precedents have been published. In 1912 the Solicitor for the State Department, J. Reuben Clark, published a memorandum entitled *Right to Protect Citizens in Foreign Countries by Landing Forces*. An appendix listed forty-one episodes. The study was republished in 1934: a Supplemental Appendix added a considerable number of later cases under the headings of China, Cuba, Dominican Republic, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, France (in 1914 six men from the U.S.S. *Tennessee* were stationed as guards at the Embassy in Paris for one week), and Smyrna.¹ In 1928 Milton Offutt's *The Protection of Citizens Abroad by the Armed Forces of the United States*² was published. Offutt estimated that "The armed forces of the United States have been landed on foreign soil for the protection of the lives and property of American citizens living abroad on more than one hundred occasions during the past hundred and fifteen years."³ In 1945 a former Assistant Secretary of State, James Grafton Rogers, published *World Policing and the Constitution*.⁴ In an appendix he listed 149 cases or clusters of cases. In not more than a dozen or two of these, he said, had Congress authorized "the employment of guns or men." "In all the other affairs listed, running to well over a hundred, the Executive alone has assumed responsibility."⁵ It may be added that in the great majority of these cases there was no collision of hostile forces and no bloodshed.

In a number of the cases compiled by these authors the President reported the action to Congress: sometimes he offered a justification. In other cases he did not report. In still other cases the action was taken by naval officers on their own initiative: only very infrequently were these actions ever reported to Congress.

*A Center Occasional Paper, center for the Study of Democratic Institutions, April 1968.

¹ *Right to Protect Citizens in Foreign Countries by Landing Forces*, Memorandum of the Solicitor for the Department of State, October 5, 1912, Third Revised Edition with Supplemental Appendix up to 1933 (Washington: Government Printing Office, 1934).

² Baltimore: Johns Hopkins Press, 1928.

³ *Ibid.*, p. 1.

⁴ Boston: World Peace Foundation, 1945.

⁵ *Ibid.*, p. 79.

It is possible to classify the cases of executive action into several types. They are presented here in what is more or less an order of increasing gravity.⁶

In several cases the executive authority has apparently felt justified in taking unauthorized action because the foe was politically unorganized. The assumption has been that war can exist only between states. The first such case President Jackson reported in his fourth annual message on December 4, 1832:

An act of piracy having been committed on one of our trading ships by the inhabitants of a settlement on the west coast of Sumatra, a frigate was dispatched with orders to demand satisfaction for the injury if those who committed it should be found to be members of a regular government, capable of maintaining the usual relations with foreign nations; but if, as was supposed and as they proved to be, they were a band of lawless pirates, to inflict such a chastisement as would deter them and others from like aggressions. This last was done, and the effect has been an increased respect for our flag in those distant seas and additional security for our commerce.⁷

There were other punitive attacks on Sumatra in 1838 and 1839. In 1840, 1855, and 1858 retaliatory attacks were made in the Fiji Islands. In 1841 there was a raid on Drummond Island in the Pacific and on Samoa. In 1843 there were raids on the West African coast. In 1867, in Formosa, there was an unsuccessful pursuit of natives who were in effect independent of the official government of the island.

The most important case in this category was the bombardment of Greytown, Nicaragua, in 1854. The mouth of the San Juan River was the eastern terminus of one of the routes across the Isthmus. Great Britain claimed a protectorate over the "Mosquito Coast," and under a charter from the Mosquito King a company of American and European adventurers set up a transit company to conduct travelers over the Isthmus. In 1852, with the consent of the Mosquito King and under the patronage of the British consul, this group established the sovereign state of Greytown. A rival enterprise, the Accessory Transit Company, held a charter from the Nicaraguan government and enjoyed the patronage of the United States government; it had its seat directly across the river in Punta Arenas. Inevitably friction arose. During a visit in May 1853 Captain Hollins of the U.S.S. *Cyane* temporarily placed a marine guard on property of the Accessory Transit Company which had been ordered to be cleared by the Greytown authorities. After his departure there occurred various incidents; in the course of one of them the American Minister to Central America suffered a slight cut from a bottle thrown by a member of a Greytown mob. The Secretary of the Navy ordered Hollins to return and obtain redress for the damages suffered by the Accessory Transit Company and an apology for the attack upon the Minister. His instructions were ambiguous. The people of Greytown "should be taught that the United States will not tolerate these outrages, and that they have the power and the determination to check them. It is, however, very much to be hoped that you can effect the purposes of your visit without a resort to violence and destruction of property and loss of life. The presence of

⁶ Most of the cases are to be found in one or more of the three books cited. Usually Offutt's account is the fullest.

⁷ James D. Richardson, ed., *Messages and Papers of the Presidents 1789-1908* (Washington: Bureau of National Literature and Art, 1908), Vol. 2, p. 596.

your vessel will, no doubt, work much good. The Department reposes much in your prudence and good sense."⁸

Upon his arrival on July 12, 1854, Captain Hollins demanded an indemnity of \$24,000 for the Accessory Transit Company, an apology for the attack on the Minister, and assurances of good behavior. Greytown did not comply, and on July 13 Hollins shelled the town intermittently throughout the day, and at four o'clock he sent a party ashore to burn what remained of the town. He reported: "The execution done by our shot and shell amounted to the almost total destruction of the buildings; but it was thought best to make the punishment of such a character as to inculcate a lesson never to be forgotten by those who have for so long a time set at defiance all warnings, and satisfy the whole world that the United States have the power and determination to enforce that reparation and respect due to them as a Government in whatever quarter the outrages may be committed."⁹

This episode is frequently paraded today as an illustration of the constitutional powers of the President. It was not so regarded at the time. The leading study of the affair reports:

Hollins' action met with strong condemnation from the American press and people. *The New York Times* was particularly bitter, and, assuming that the action was directed or approved by the government, intimated that the terms of the Clayton-Bulwer treaty had been broken, and denounced President Pierce for a violation of the Constitution of the United States, on the ground that Congress alone could declare war. The *Times* was an opposition paper, but the best elements of the Democrats themselves felt that they could not honestly defend the deed. The fact that resolutions from both houses of Congress, asking for the correspondence upon the subject, with a copy of Hollins' instructions, were carried by a large majority and in spite of administrative opposition was indicative of the general disapprobation of the country.¹⁰

The Minister to Great Britain, James Buchanan, assured the British government that Hollins' action was unauthorized and would be disavowed by the United States.¹¹ Secretary of State Marcy, however, saw no way of repudiating Hollins' act; at the same time, he dared not indorse it, and so when the British Ambassador approached him he said that he could not express an opinion because the matter was under the consideration of the government.¹² Both the Senate and the House demanded information on the bombardment. In the meantime, France, the German Confederation, and Nicaragua demanded indemnification for the destruction of the property of their nationals.

On August 8 Marcy wrote to Buchanan: "The occurrence at Greytown is an embarrassing affair. The place merited chastisement, but the severity of the one inflicted exceeded our expectations. The government will however, I think, stand by Capt. Hollins."¹³ The government had no choice. To admit the impropriety of Hollins' action, which was more or less warranted by his instructions, would put the administration in a hopeless position in domestic politics and would oblige it to satisfy the foreign claims.

⁸ John Bassett Moore, *Digest of International Law* (Washington: Government Printing Office, 1906), Vol. 7, pp. 113-4.

⁹ *Ibid.*, p. 114.

¹⁰ Mary W. Williams, *Anglo-American Isthmian Diplomacy* (New York: Russell & Russell, 1965), pp. 179-80.

¹¹ *Ibid.*, p. 181.

¹² *Loc. cit.*

¹³ *Loc. cit.*

President Pierce finally broke the official silence in his annual message to Congress on December 4, 1854. He brazened the matter out. After a tendentious and highly colored report of the events which were alleged to justify the destruction of Greytown, he undertook to remove the action from the category of war by denying the status of an organized society to Greytown and representing the community as a band of outlaws or pirates:

Justice required that reparation should be made for so many and such gross wrongs, and that a course of insolence and plunder, tending directly to the insecurity of the lives of numerous travelers and of the rich treasure belonging to our citizens passing over this transit way, should be peremptorily arrested. Whatever it might be in other respects, the community in question, in power to do mischief, was not despicable. It was well provided with ordnance, small arms, and ammunition, and might easily seize on the unarmed small boats, freighted with millions of property, which passed almost daily within its reach. It did not profess to belong to any regular government, and had, in fact, no recognized dependence on or connection with anyone to which the United States or their injured citizens might apply for redress or which could be held responsible in any way for the outrages committed. Not standing before the world in the attitude of an organized political society, being neither competent to exercise the rights nor to discharge the obligations of a government, it was, in fact, a marauding establishment too dangerous to be disregarded and too guilty to pass unpunished, and yet incapable of being treated in any other way than as a piratical resort of outlaws or a camp of savages depredating on emigrant trains or caravans and the frontier settlements of civilized states.¹⁴

This riot of language bore no relation to fact. There had been no complaint whatever that Greytown plundered or abused travelers. Neither the \$24,000 at stake between Greytown and the Accessory Transit Co., nor the insult to the American Minister involved any act of piracy or depredation. Pierce therefore supplemented his analogy to piracy with an analogy to acts of reprisal by European states: If comparisons were to be instituted, it would not be difficult to present repeated instances in the history of states standing in the very front of modern civilization where communities far less offending and more defenseless than Greytown have been chastized with much greater severity, and where not cities only have been laid in ruins, but human life has been recklessly sacrificed and the blood of the innocent made profusely to mingle with that of the guilty.¹⁵

But Pierce was not able to offer any precedent in which the United States had inflicted injury on such a scale without an act of Congress.

This is the most famous case of unauthorized warmaking by the executive in the nineteenth century. It is a precedent not to be imitated but to be avoided.

In cases of this class, the executive assumed that the use of force was not an exercise of the war power because the victim was not a formally organized state. The next stage of gravity is reached by limited incursions into the territory of an organized state which were not directed against the government of that state but against pirates the bandits who had taken shelter there. The undeclared Seminole

¹⁴ Richardson, *op. cit.*, Vol. 5, p. 282.

¹⁵ *Ibid.*, p. 284.

War lasted from 1816 to 1818; General Jackson pursued the Seminoles into Florida and while there engaged the Spanish as well and hanged two British subjects; this last action touched off much criticism of the whole enterprise.

In 1817, on the orders of President Monroe, American forces attacked pirates and smugglers on Amelia Island in Spanish Florida. In 1822, 1823, 1824, and 1825, American commanders pursued pirates ashore in Cuba and destroyed their ships and bases. In 1827 naval vessels policing the waters about the Greek Islands not only destroyed piratical vessels at sea but twice landed in search of pirates. In 1857 Commodore Paulding arrested the filibusterer William Walker on Nicaraguan soil and returned him to Washington, where he was immediately released. President Buchanan confessed to Congress that Paulding's action had been improper, but insisted that he had acted with good intentions.¹⁰ The extenuation provoked bitter criticism in Congress of Buchanan himself. In 1859 Captain Ford with fifty men pursued the bandit Cortino into Mexico. A large number of such pursuits occurred in the next fifty years; the latest occurred in 1916 when President Wilson sent a punitive force in pursuit of Pancho Villa. This force penetrated four hundred miles into Mexico and remained in that country several months; it engaged in hostilities with troops of the Mexican government. President Carranza protested against this invasion as a hostile act.

In a number of cases naval action has been taken against subordinate local authorities of a foreign state who had committed acts of hostility without the authorization of their national government. In 1863 occurred a naval engagement with ships of the Prince of Nagato of Japan in the straits of Shimonoseki; in 1864 an American ship participated in a successful allied attack on the Prince's forts on the shore. Conceivably the landing to protect citizens in Yokohama in 1868 could be brought under this heading. In 1871 forts in Korea which had shelled American ships were stormed and destroyed.

In still another class of cases, marines or sailors have been landed in order to protect United States citizens from a temporary threat of mob violence. In August of 1859 marines were landed in Woosung and Shanghai to protect citizens during a riot against foreigners. When the British shelled Alexandria, Egypt in 1882, causing fires and a breakdown of government, a force of 126 men was landed, primarily to protect the United States consulate; they were withdrawn the next day. There were a large number of such landings in China between 1911 and 1933, and considerable bodies of marines were stationed in various ports for long periods of time.

Mob violence usually has no political aspect; it is not an effort to overthrow the local government. The landing of American troops in time of revolution is another matter, for even undesignedly it may favor one side or the other. There have been a number of such landings. Sometimes they have been invited by the *de jure* government; sometimes they have been tolerated or indorsed; sometimes they have occurred over the objection of the *de jure* government; sometimes they have been welcomed by both parties. In 1852-1853, during a civil war in Argentina, there were several landings in Buenos Aires to protect citizens. In 1855 and 1858 there were landings in Uruguay in time of

¹⁰ Richardson, *op. cit.*, Vol. 5, p. 466.

revolution, on the second occasion at the request of the de jure government. There have been a large number of landings to protect American citizens and interests in the Caribbean. These began with concern to keep the Isthmus routes open, so that Nicaragua and Colombia were the scenes; after the Spanish-American War the protection of citizens and their investments during a revolution became a cause for intervention in all the Central American and Caribbean states.

A broadening pattern of intervention can be discerned. The first cases are landings to protect the consulate or a railroad station. Next we find marines garrisoning trains to insure their movement across the Isthmus. We find American forces policing towns during a revolution, receiving the custody of a town from a retreating force and turning it over to the other faction when it arrives. When Panama rebelled and seceded from Colombia in 1903 President Theodore Roosevelt interposed American forces to prevent the Colombian government from attacking the rebels and thus aided the revolution.

The device of the "neutral zone" appears to have been invented in 1904. During a rebellion in the Dominican Republic against the Morales government, which enjoyed the favor of Washington, Commander Dillingham landed American forces and announced that there could be no fighting in the city of Puerto Plata. The rebels, who held the city, marched out to fight, were defeated, and were required to throw down their arms when they re-entered the city. The Morales government triumphed.

The same device worked to the disadvantage of the legitimate government in Nicaragua in 1910. Commander Gilmer of the *Paducah* issued a proclamation to both sides that there should be no bombardment of or fighting in Bluefields; he would permit no more than one hundred armed men in the city to serve as police. President Madriz complained to President Taft that this action enabled the rebels to neglect their base in Bluefields and to concentrate their forces and defeat him. Secretary of State Knox replied: "The United States took only the customary step of prohibiting bombardment or fighting by either faction within the unfortified and ungarrisoned city of Bluefields, thus protecting the preponderating American and other foreign interests."¹⁷ On a later occasion, when General Rivas of the Madriz forces threatened to shell ships which were supplying the rebels, Commander Hines warned him that if he did so he would attack him. Madriz was defeated and fled.

Sometimes intervention for the ostensible purpose of protecting citizens in time of revolution is quite naked military intervention on one side or the other. In 1874 there was a dispute over the succession to the throne of Hawaii. At the request of the Hawaiian Minister of Foreign Affairs, relayed by the United States Minister to Hawaii, Commander Belknap landed 150 men and a Gatling gun, took possession of the courthouse, and insured the installation of King David Kalakaua. This action for the protection of the rights of American citizens was undertaken against an American citizen, the dowager Queen Emma, who was the other claimant of the throne.

In 1893, desiring to overthrow Queen Liliuokalani, American residents in Hawaii asked the Minister for forces to protect their lives and property. A party was landed from the U.S.S. *Boston*, and on the next day the Queen was deposed. Sanford B. Dole was made president and

¹⁷ Offutt, *op. cit.*, pp. 106-107.

the Minister agreed to institute a kind of protectorate; the American flag was run up over public buildings. President Cleveland repudiated the whole proceeding and the flag came down. Dole, however, continued as the president of a republic until the annexation of Hawaii by the United States in 1898.

In 1899 there was a dispute over the succession to the throne of Samoa. One claimant was favored by the United States and Great Britain, the other by Germany. Rear Admiral Kautz occupied the town of Apia and insured the installation of King Malietoa. There was sniping from the other faction; with British help Kautz suppressed the rebels.

Dr. Juan Bosch was elected President of the Dominican Republic in 1963 by 58 per cent of the vote in that country's first free election. He was not favored by Washington, and was overthrown by a military coup within a few months. On April 24, 1965 a portion of the army rebelled against the ruling military junta and called upon President Bosch to return. By April 28 the junta was hard-pressed, and Colonel Benoit asked for American assistance on the ground that their defeat would be a victory for communism. He was told that "the United States would not intervene *unless he said that he could not protect American citizens present in the Dominican Republic.*"¹⁸ He amended his plea and on the same day President Johnson announced:

The United States government has been informed that American lives are in danger. These authorities are no longer able to guarantee their safety and they have reported that the assistance of military personnel is now needed for that purpose. I have ordered the Secretary of Defense to put the necessary American troops ashore in order to give protection to hundreds of Americans who are still in the Dominican Republic and to escort them safely back to this country.¹⁹

To rescue these hundreds of Americans, 21,000 troops were landed and 9,000 more deployed on naval vessels off the shore. The troops were not withdrawn when the citizens were evacuated; they remained to insure that Bosch did not return and that his faction capitulated. This occurred.

Before intervening, President Johnson informed Congressional leaders "that United States Marines would be landed in Santo Domingo that night for the sole purpose of protecting the lives of Americans and other foreigners."²⁰ Senator Fulbright has written:

Four months later, after an exhaustive review of the Dominican crisis by the Senate Foreign Relations Committee in closed sessions, it was clear beyond reasonable doubt that although saving American lives may have been a factor in the decision to intervene on April 28, the major reason was a determination on the part of the United States government to defeat the rebel, or constitutionalist, forces whose victory at that time was imminent.²¹

One step further than intervening in a revolutionary situation is to attack the legitimate government of a foreign country in such a manner that the United States and that government are the only antagonists. In 1824 Commodore Porter of the *John Adams*, in reprisal

¹⁸ J. William Fulbright, *The Arrogance of Power* (New York: Random House, 1966), p. 89. (Italics in original.)

¹⁹ Richard P. Stebbins, ed., *Documents on American Foreign Relations, 1965* (New York: Harper & Row, 1966), p. 234.

²⁰ Fulbright, *op. cit.*, p. 49.

²¹ *Loc. cit.*

for maltreatment of an American naval lieutenant, attacked the town of Foxardo in Puerto Rico and extorted apologies. He was recalled, court-martialed, and suspended for six months, whereupon he resigned. In 1831, on orders of President Jackson, the U.S.S. *Lexington* rescued the crews of three sealing schooners who had been imprisoned by the military governor of the Falkland Islands.

In 1853 Martin Koszta, a native of Hungary who had declared his intention of acquiring American citizenship but had not yet taken out his "second papers," was seized in Smyrna and carried aboard the Austrian vessel *Hussar*. Captain Ingraham of the American sloop of war *St. Louis* learned of this, trained his guns on the *Hussar*, and demanded the release of Koszta. The two commanders agreed to consult with the French consul and the outcome was that Koszta was awarded to Ingraham. Subsequently the Austrian government complained of Ingraham's conduct and demanded the return of Koszta, but President Pierce rejected the complaint and Congress voted the Captain a gold medal.

In 1851 Captain Pearson of the sloop of war *Dale* extorted from the king of Johanna Island \$1,000 as indemnity for the imprisonment of an American whaling captain by threatening to bombard the town. In 1854, during the Taiping rebellion, the Imperial forces in Shanghai conducted themselves badly toward foreigners, and American and British forces landed and routed the Chinese. In 1856 a force of sailors and marines stormed and razed the "barrier forts" at Canton.

For some reason Clark, Offutt, and Rogers have omitted one of the most famous of these episodes. In 1904 Ion Perdicaris, an American citizen, was kidnapped by a Moroccan bandit, Ahmed ibn-Muhammed Raisuli, and was held for ransom. President Roosevelt sent ships of war to Tangier, and Secretary of State John Hay sent to Sultan Abd-al-Aziz IV a terse telegram, "Perdicaris alive or Raisuli dead." The Sultan, threatened with war, paid the ransom.

Even before the establishment of the United Nations, the "pacific blockade" had dubious standing at international law. The United States was one of the states that recognized the validity under some circumstances of the pacific blockade, but it approved only of the interdiction of vessels belonging to the blockaded state. But in 1962 President Kennedy, without a recourse to Congress, announced what he called a pacific blockade of Soviet shipping bound for Cuba. This was a threat to commit an act of war against the Soviet Union without consulting Congress.

An intervention for the protection of citizens against a mob is sometimes converted into a war with the government of the state which is invaded. At the time of the Boxer Rebellion in China in 1900, President McKinley sent forces, eventually 5,000 men, in what began as an allied effort to rescue citizens in Peking and ended as a war with the Imperial Government of China. China was obliged to sign a protocol, which was never submitted to the Senate, promising to pay an indemnity of \$330,000,000, of which \$24,000,000 was to be paid to the United States.

In the twentieth century a still more spectacular level of intervention in the affairs of foreign states was reached. This consisted in actually taking over and administering the governments of foreign states by unauthorized executive action. Haiti was occupied from 1915 to 1934; after the initial conquest the marines conducted an election and this

yielded a government which legitimized the occupation by treaty. In 1916 President Wilson occupied the Dominican Republic, and this state was under direct military government until 1922, when a Dominican government was installed; the marines were withdrawn in 1924. From 1912 to 1925, and from 1928 to 1933, the United States maintained a dominating military presence in Nicaragua. In 1906 the government of Cuba was paralyzed by insurrection. Thereupon President Theodore Roosevelt appointed Secretary of War Taft provisional governor; soon he replaced him with the governor of the Canal Zone. Troops were sent in; the occupation lasted three years. Roosevelt relied upon the so-called Platt amendment, which had been incorporated in the Cuban constitution in 1902 and in a treaty between the United States and Cuba ratified in 1904:

The Government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the Treaty of Paris on the United States, now to be assumed and undertaken by the Government of Cuba.²²

This brings up our last category of involvement, which might be called war by invitation. The Platt amendment did not authorize the President to intervene, but the United States; and in any case Cuba could not transfer the power of Congress to initiate military action to the President either by amending its constitution or by signing a treaty. But when an intervention is sanctioned by the law or government of the state invaded, the action looks less like war. And in some cases, of course, it is not war. In 1941 President Franklin D. Roosevelt occupied Greenland and Iceland by agreement with the local authorities, and in the same year he occupied Dutch Guiana by agreement with the Netherlands government-in-exile. Clearly he usurped the treaty power, but he did not usurp the war power, for there was no question of hostilities within these territories. In 1958 President Eisenhower landed troops in Lebanon "to protect American lives and by their presence there to encourage the Lebanese in defense of Lebanese sovereignty and integrity."²³ There was no military action and apparently no threat either to American citizens or to the Lebanese government; the fact seems to be that the government of Lebanon consented to the use of its territory as a staging area for possible action in Jordan.

The case is quite different with President Truman's intervention in the Korean war in 1950. He committed air and naval forces at the request of the South Korean government. Then he procured a vote of the Security Council of the United Nations appealing for action by members and he thereafter purported to act by authority of the United Nations. But Congress in enacting the United Nations Participation Act²⁴ in 1945 had stipulated that any agreement by which the United States supplied troops to the United Nations must be approved by Congress. Truman neither sought nor received any Congressional

²² *Papers Relating to the Foreign Relations of the United States*, 85th Cong., 3d Sess., Doc. No. 1 (1905), p. 244.

²³ Message to Congress, *Congressional Record*, Vol. 104, Pt. 11 (July 15, 1958), pp. 13767-8. In his Ninth Annual Message, Jan. 12, 1961, President Eisenhower said: "Our Government responded to the request of the friendly Lebanese Government for military help, and promptly withdraw American forces as soon as the situation was stabilized." Fred L. Israel, ed., *The State of the Union Messages of the Presidents, 1790-1966* (New York: Chelsea House, Robert Hector, 1966), Vol. 3, p. 3109.

²⁴ 27 U.S.C. 287d; 59 Stat. 621 as amended 63 Stat. 735 (1949).

authorization for a war which lasted three years and cost more than 140,000 casualties.

Similarly President Johnson has engaged in two wars in Vietnam. Presumably he is fighting the war in South Vietnam, which has already cost more than 120,000 casualties, at the invitation of the South Vietnamese government. The war against North Vietnam is justified by the various other arguments we are examining.

If war by invitation is constitutional, there is a new and easy formula for usurpation of the war power. *It is only necessary for the executive to lodge a puppet government on foreign territory, recognize it, and then accept its invitation to send troops to suppress all opposition to the puppet government.* This has been the history of the American intervention in South Vietnam. Apparently it was the plan that lay behind the invasion of Cuba in 1961. The Bay of Pigs was chosen as a landing point because it was relatively inaccessible from the rest of the island. An informed study reports that "Dulles and Bissell did not suggest that the Castro regime would topple the moment Artime's men hit the beach, but they did predict that there would be enough uprisings around the country so that the beachhead could be held and consolidated and so that the rebels could establish a government on Cuban soil which the United States then could recognize and support."²⁵ One supposes that the support would have taken the form of landings of marines and attacks from the air.

These are by no means all the cases in which the executive has committed American forces abroad or committed or threatened to commit acts of violence without Congressional authorization; but they illustrate all the types of cases and include the more important ones.

CHAPTER VII: SEATO AND OTHER COMMITMENTS

The Southeast Asia Collective Defense Treaty¹ was ratified by the Senate in 1955. The other parties were Australia, France, New Zealand, Pakistan, the Philippines, Thailand, and Great Britain. It was to apply in "the general area of Southeast Asia, including also the entire territory of the Asian Parties, and the general area of the Southwest Pacific not including the Pacific area north of 21 degrees 30 minutes north latitude." By protocol the parties specified that the treaty should apply to Cambodia, Laos, "and the free territory under the jurisdiction of the State of Vietnam."

The purpose of a treaty is to raise an obligation at international law between the signatories. It need hardly be said that the obligations which we incurred in the SEATO treaty run only to the other signatories of the treaty. South Vietnam was not a party: indeed, the treaty does not recognize the existence of a state of South Vietnam, but only of a state of Vietnam, of which, at the Geneva Conference of 1954, the Hanoi government of Ho Chi Minh was accepted as the international

²⁵ Andrew Tully, *CIA: The Inside Story* (New York: Morrow, 1962), p. 249.

¹ *United States Treaties and Other International Agreements* (Washington: Government Printing Office, 1955), Vol. 6, Pt. 1, pp. 82-88. The treaty is reproduced in *Vietnam and International Law* by the Consultative Council of the Lawyers Committee on American Policy towards Vietnam (Flanders, N.J.: O'Hare Books, 1967), pp. 152-4.

spokesman.² The treaty therefore imposes no duty upon us toward the so-called state of South Vietnam. Three of the signatories to whom we are obligated under the treaty disapprove of or have refused to support the war in either South or North Vietnam. Four have made token commitment of troops for the war in South Vietnam: Australia and New Zealand, because they believe they are buying American protection in the event of a future war with mainland Asia; and the Philippines and Thailand, which are pensionary states of the United States. But none of these has joined in the attack on North Vietnam. It is not only the case that the war against North Vietnam does not discharge any legal obligation to any party to the SEATO Treaty: it is conducted completely outside the framework of the Southeast Asia Collective Defense Organization and without the support of any member of the Organization.

But the State Department has invented a dazzling new theory of the treaty power. Article VI of the Constitution provides that treaties, like the Constitution and acts of Congress, shall be "the supreme law of the land." The purpose of including this provision was to give assurance to foreign states that international obligations would be observed. But the State Department now contends that a treaty can work consequences in municipal law where no international obligation is involved. Thus a treaty becomes a piece of domestic legislation like an act of Congress, and the other parties to the treaty merely decorative supernumeraries.

Article IV, Section I of the SEATO Treaty provides that "each Party recognizes that aggression by means of armed attack in the treaty area against any of the Parties or against any state or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitu-

² Both the Saigon government of Bao Dai and the Hanoi government were represented at the Geneva Conference. Between 1949 and 1954 the French had made seventeen ambiguous statements to the effect that Vietnam was an independent state: on June 4, 1954, a treaty with Saigon to this effect was initiated, but it was never signed, ratified, or implemented. Bernard B. Fall, *Viet-Nam Witness, 1953-66* (New York: Praeger, 1966), p. 56; Fall, *The Two Viet-Nams* (2d ed.; New York: Praeger, 1967), pp. 222-3. Bao Dai had been appointed by the French and had no other support: realistically viewed, he was a colonial representative of the French, and so they continued to treat him. On July 20, 1954, the French and the Hanoi government, as the two interested parties—the French did not even consult Saigon—signed the "Agreement on the Cessation of Hostilities in Vietnam." This agreement provided for a cease-fire and the withdrawal of the forces of "the People's Army of Vietnam" to a northern zone and of those of the French Union to a southern zone in order to prevent the resumption of hostilities; it provided for enforcement of the cease-fire by the French commander-in-chief and the commander-in-chief of the People's Army of Vietnam. But the regrouping zones were to endure only until "the general elections which will bring about the unification of Vietnam." On July 21, Anthony Eden, who presided, presented to the Geneva Conference a "Final Declaration." Among other things, this Declaration indorsed the Franco-Vietnamese armistice agreement and recognized "that the military demarcation line is provisional and should not in any way be interpreted as constituting a political or territorial boundary." It provided for general elections in July, 1956 for the unification of Vietnam; these were to be supervised by the International Supervisory Commission which was to be created under the armistice agreement. France, Great Britain, the People's Republic of China, the Soviet Union, Cambodia, Laos, and the Hanoi government orally announced their acceptance of the Declaration. Under Secretary Bedell Smith said that the United States was not prepared to join in the Declaration but said that the United States would not disturb the agreements by force or the threat of force, and that it favored the unification of countries divided against their will by free elections supervised by the United Nations. On August 23, 1965, Secretary Rusk said that this statement "in effect embraced those agreements on behalf of the United States." Edward S. Herman and Richard B. DuBoff, *America's Vietnam Policy: The Strategy of Deception* (Washington: Public Affairs Press, 1966), p. 16n. Only Tran Van Don of Saigon denounced the settlement as "catastrophic and immoral." The documents are reproduced in *Vietnam and International Law*, pp. 137-50. The history is reviewed in Joseph Buttluger, *Vietnam: A Dragon Embattled* (New York: Praeger, 1967), Vol. 2, pp. 824-44. It was not until October 26, 1955 that Diem officially ousted Bao Dai, ending the French role and making South Vietnam (or all of Vietnam, as he claimed) "independent." The SEATO treaty, which was signed September 8, 1954, could involve no obligation to a state which came into existence more than a year later.

tional processes." There was no consultation with the Southeast Asia Treaty Organization before President Johnson attacked North Vietnam on February 7, 1965. The position of the State Department is that the treaty authorizes independent decision and independent action by any signatory. Consequently it would be open to France to regard Johnson's activities as an "armed attack in the treaty area" and to "act to meet the common danger" under the aegis of the treaty. An interpretation of the treaty which makes it possible for the American action to be simultaneously legal and illegal is an odd interpretation.

Not only did President Johnson not consult SEATO; although the treaty requires that each signatory act "in accordance with its constitutional processes," he did not consult Congress either. The claim that the treaty relieves the President of the need to consult Congress was first advanced in 1966 in the State Department memorandum:

Under Article VI of the United States Constitution, "all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." Article IV, paragraph 1, of the SEATO treaty establishes as a matter of law that a Communist armed attack against South Vietnam endangers the peace and safety of the United States. In this same provision the United States has undertaken a commitment in the SEATO Treaty to "act to meet the common danger in accordance with its constitutional processes" in the event of such an attack.

Under our Constitution it is the President who must decide when an armed attack has occurred. He has also the constitutional responsibility for determining what measures of defense are required when the peace and safety of the United States are endangered. If he considers that deployment of U.S. forces to South Vietnam is required, and that military measures against the source of Communist aggression in North Vietnam are necessary, he is constitutionally empowered to take those measures.³

The first difficulty with this argument is the assumption that the President and the Senate may use the instrumentality of a treaty to make war, depriving the House of Representatives of its voice. If this is true, the President and the Senate might make a treaty with Liberia, let us say, and then embark upon a war with any country in the world. This is to substitute Liberia for our House of Representatives.

Although a treaty made within the scope of the treaty-making power is equally with an act of Congress the supreme law of the land, it is clear that some powers are vested exclusively in Congress. The framers intended this to be true of the war power. Alexander Hamilton submitted a draft proposal to the Constitutional Convention which would have vested the power to make war in the Senate,⁴ but the report of the committee of detail gave it to the Congress. When this clause came up for debate, Charles Pinckney suggested that the power should be given to the Senate—"It would be singular for one authority to make war, and another peace"—but he found no second.⁵ As we have seen, the report of the committee was adopted with a change of the word "make" to "declare."

The question of the scope of the treaty power arose in the first decade of our constitutional history. The Jay Treaty with Great Britain

³ *Memorandum, in Vietnam and International Law*, p. 124.

⁴ Charles C. Tansill, ed., *Documents Illustrative of the Union of the American States* (Washington: Government Printing Office, 1927), pp. 979-88.

⁵ *Ibid.*, pp. 561-2.

was ratified by the Senate in 1795, but it was very unpopular. In 1796 it was argued in the House that the House of Representatives was legally bound to appropriate money to pay the British claims recognized as valid by the treaty, James Madison replied that on such a theory the President and the Senate might by treaty deprive the House of its voice in making war, which appeared to him unthinkable:

Under a constitutional obligation with such sanctions to it, Congress, in case the President and Senate should enter into an alliance for war, would be nothing more than the heralds for proclaiming it.⁶

The House adopted a resolution drafted by Madison declaring that it was entitled to an independent judgment on all appropriations, and then voted money to satisfy the British claims.

In his argument Madison contended that a treaty could not establish binding law on any topic on which Congress possessed legislative power. This is unquestionably too broad. Congress has the power to regulate commerce with foreign states, but treaties concerning commerce have been familiar since the beginning of our history, and appear to have been challenged only when they altered import duties.

But the right of the House of Representatives to participate in the making of appropriations is universally admitted. Sitting on circuit in 1852, Justice McLean of the Supreme Court said:

A treaty under the federal constitution is said to be the supreme law of the land. This, unquestionably, applies to all treaties, where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and cannot be the supreme law of the land, where the concurrence of Congress is necessary to give it effect. Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect. It is not operative, in the sense of the constitution, as money cannot be appropriated by the treaty-making power. This results from the limitations of our government. The action of no department of our government can be regarded as a law until it shall have all the sanctions required by the constitution to make it such. As well might be contended that an ordinary act of Congress, without the signature of the President, was a law, as that the treaty which engages to pay a sum of money is in itself a law.

And in such a case the representatives of the people and the States exercise their own judgments in granting or withholding the money. They act upon their own responsibility and not upon the responsibility of the treaty-making power. It cannot bind or control the legislative action in this respect, and every foreign government may be presumed to know, that so far as the treaty stipulates to pay money, the legislative sanction is required.⁷

The House of Representatives again asserted its right when it appropriated money to complete the Alaska purchase in 1867. It was argued in the House that because action by the House was necessary the ratification of the treaty should have been made expressly conditional upon the consent of the House; and the admonition that some treaty provisions "cannot be carried into full force and effect except by legislation to which the consent of both Houses of Congress is necessary" was incorporated in the appropriation bill.⁸

⁶ Quoted by Edward S. Corwin, *The President: Office and Powers* (New York: New York University Press, 1940), p. 401.

⁷ *Turner v. American Baptist Missionary Union*, 2 McLean, 344 (1852).

⁸ Chandler P. Anderson, "The Extent and Limitations of the Treaty-Making Power under the Constitution," *American Journal of International Law*, Vol. 1 (1907), p. 650.

Since the Constitution says that "All bills for raising revenue shall originate in the House of Representatives," it might appear to be even more clear that a tax cannot be imposed by treaty. And surely no one would suppose this possible in the case of internal revenue. But the issue has been debated with regard to treaties altering import duties.

The treaty of Ghent, which was negotiated with Great Britain in 1815, contained provisions for reduction of import duties. In the House of Representatives Cyrus King revived Madison's position, that "whenever a treaty or convention does, by any of its provisions, encroach upon any of the enumerated powers vested by the Constitution in the Congress of the United States, such treaty or convention, after being ratified, must be laid before Congress, and such provisions cannot be carried into effect without an act of Congress." King received support in the House, and the two houses created a conference committee to discuss differences. The committee members reported that

They are persuaded that the House of Representatives does not assert the pretension that no treaty can be made without their assent; nor do they contend that in all cases legislative aid is indispensably necessary, either to give validity to a treaty, or to carry it into execution. On the contrary, they are believed to admit, that to some, nay many treaties, no legislative sanction is required.

On the other hand the committee are no less satisfied that it is by no means the intention of the Senate to assert the treaty-making power to be in all cases independent of the legislative authority. So far from it, that they are believed to acknowledge the necessity of legislative enactment to carry into execution all treaties which contain stipulations requiring appropriations, or which might bind the nation to lay taxes, raise armies, to support navies, to grant subsidies, to create states, or to cede territory; if indeed this power exists in the government at all.⁹

On December 23, 1815 President Madison sent a message to Congress requesting that such legislative provisions as were necessary should be passed.¹⁰ Debating the bill in the House on January 9, 1816, John Calhoun said:

The treaty making power has many and powerful limits; and it will be found, when I come to discuss what those limits are, that it cannot destroy the Constitution, or our personal liberty, or involve us, without the assent of this House, in war, or grant away our money.¹¹

An act putting the treaty into effect was passed on March 1, 1816.¹²

On June 4, 1844, Rufus Choate, chairman of the committee on Foreign Relations of the Senate, reported against ratification of a reciprocity treaty with the German Zollverein:

The convention which has been submitted to the Senate changes duties which have been laid by law. . . . In the judgment of the Committee, the Legislature is the department of government by which commerce should be regulated and laws for revenue passed.¹³

In his annual message of December 3, 1844, President Tyler repeated his request for ratification of the treaty.¹⁴ In February of 1845

⁹ *Ibid.*, p. 649.

¹⁰ James D. Richardson, ed., *Messages and Papers of the Presidents* (Washington: Bureau of National Literature and Art, 1908), Vol. 1, p. 570.

¹¹ Quoted in Henry St. George Tucker, *Limitations on the Treaty-Making Power* (Boston: Little, Brown, 1915), p. 215.

¹² 3 Stat. 255.

¹³ Quoted in Tucker, *op. cit.*, p. 221.

¹⁴ Richardson, *op. cit.*, Vol. 4, pp. 339-40.

the Committee again reported adversely and the treaty was never ratified.¹⁵

It is a little surprising to find the Senate taking this position. A treaty with Brazil which went into effect in 1829 contained a most-favored-nation clause, and other such treaties had been negotiated thereafter.¹⁶

In 1875 a treaty with Hawaii by which each country agreed to admit certain articles from the other free of duty was ratified. Article V recited that it should not come into effect "until a law to carry it into operation shall have been passed by the Congress of the United States of America."¹⁷ An Act putting the treaty into effect was passed on August 15, 1876. The treaty expired by its own terms at the end of seven years. In 1884 a seven-year extension was negotiated. This was approved by the Senate on January 20, 1887.¹⁸ On January 22 Representative Wallace introduced in the House a resolution complaining that the treaty of renewal contained no provision requiring Congressional action and charging the Committee on the Judiciary with inquiring "how far the power conferred on the House by the Constitution of the United States to originate measures to lay and collect duties can be controlled by the treaty-making power under the said Constitution."¹⁹ On March 3, J. Randolph Tucker submitted a lengthy report by the Committee. It proposed two resolutions. One declared that import duties could not be regulated by the treaty power; the other requested the President to withhold final action until Congress sanctioned the treaty.²⁰ Nevertheless, on November 7 the President announced ratification.

In 1902 Senator Cullom, Chairman of the Senate Committee on Foreign Relations, discussing proposed reciprocal trade treaties, pointed out that the House, despite its protests, had always made appropriations to carry out the stipulations of a treaty, "and I contend that it was bound to do this, at least as much as Congress can be bound to do anything when the faith of the nation has been pledged. And this appears to me to be the only case in which any action by the House is necessary, unless the treaty itself stipulates, expressly or by implication, for such Congressional action." The House then instructed the Committee on Ways and Means to investigate the question whether the President and the Senate, "independent of any action on the part of the House of Representatives, can negotiate treaties with foreign governments by which duties levied under an act of Congress for the purpose of raising revenue are modified or repealed, and report the result of such investigation to the House." It does not appear that a report was made.²¹

The question of the treaty power and import duties must remain for the time in the realm of unsettled questions.

In 1854 a treaty was negotiated with Venezuela which provided that if a citizen of either country should accept a commission in the service of a state at war with the other he should be treated as a pirate. But President Pierce did not submit the treaty to the Senate because the

¹⁵ Tucker, *loc. cit.*

¹⁶ William N. Malloy, compiler, *International Acts, Protocols and Agreements between the United States and Other Powers* (Washington: Government Printing Office, 1910), Vol. 1, p. 134.

¹⁷ Malloy, *op. cit.*, pp. 915-9.

¹⁸ *Ibid.*, pp. 919-20.

¹⁹ Tucker, *op. cit.*, pp. 342-3.

²⁰ Tucker, *op. cit.*, pp. 342-79.

²¹ Anderson, *op. cit.*, pp. 650-51.

definition and punishment of piracy belonged to Congress.²² And indeed one would suppose that no action can be made criminal by the treaty power without the assistance of an act of Congress. Certainly such a thing has never been attempted.

The question of the scope of the treaty power has also been raised concerning other topics: the acquisition and the cession of territory, and the alienation of the public domain, for example. But those unresolved problems need not concern us. There emerges very clearly the proposition that the treaty power and the legislative powers of Congress are only in part concurrent. It is well known that treaties may deal with topics on which Congress has no delegated power to legislate. It is equally clear that Congress has exclusive legislative power on certain topics, and a treaty on such a topic does not have legal standing at municipal law; it cannot be put into effect without an act of Congress.

The general principle is that the treaty power cannot be used in such a way as to alter the constitutional distribution of powers. So the United States objected to the proposal for the creation of an international Prize Court because the Constitution does not permit appeals from decisions of the United States Supreme Court.²³ In *Reid v.*

*Covert*²⁴ in 1957 the Supreme Court had before it in act of Congress which provided for the trial of civilian dependents of military personnel abroad, thus ousting the constitutional courts of their jurisdiction under Article III and depriving the dependents of their right to jury trial. The government justified the act as one necessary to carry out executive agreements with Great Britain and Japan which were treated as having the force of treaties. Justice Black said: "The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."²⁵

Does the Constitution vest the war power exclusively in Congress? As we have seen, the Constitutional Convention expressly rejected the proposal that it be given to the President and the Senate. The German jurist Ernst Meier observed: "The Constitution gives Congress the right of declaring war; this right would be illusory if the President and the Senate could by treaty launch the country into a foreign war."²⁶ Apparently Francis Wharton and John Bassett Moore, two of our leading international lawyers, agreed with him.²⁷

After reviewing the evidence, a former Assistant Secretary of State, James Grafton Rogers, concluded:

The Constitution says, therefore, in effect, "Our country shall not be committed formally to a trial of force with another nation, our people generally summoned to the effort and all the legal consequences to people, rights and property incurred until the House, Senate and the President agree."²⁸

²² *Ibid.*, p. 654.

²³ Bernard Schwartz, *Commentary on the Constitution of the United States* (New York: Macmillan, 1963), Vol. 2, p. 137.

²⁴ 354 U.S. 1.

²⁵ *Id.* at 16.

²⁶ John Bassett Moore, *Digest of International Law* (Washington: Government Printing Office, 1906), Vol. 5, § 737.

²⁷ *Loc. cit.*

²⁸ James Grafton Rogers, *World Policing and the Constitution* (Boston: World Peace Foundation, 1945), p. 35.

This does not mean that it is impossible for the President and the Senate to enter into a treaty of alliance. It does mean that when it is alleged that circumstances have arisen which under the treaty require the United States to go to war it is necessary for the two houses of Congress and the President, not for the President alone, or for that matter for the President and the Senate, to judge of those circumstances and to make the decision to go to war.

But suppose the law were otherwise: suppose the Senate might by treaty authorize the President to make war. The fact is that no word of the SEATO Treaty purports to do so. Nor was it in any way intimated to the Senate when it ratified the treaty that it involved a delegation of the power to make war in Southeast Asia. The treaty provides that in the event of an armed attack in the future each member is to act in accordance with its "constitutional processes." This clearly contemplates that when it is alleged that an armed attack has occurred the facts are to be laid before the two houses of Congress, and Congress, if it finds this proper, is to pass a joint resolution to be submitted to the President.

Nevertheless the State Department, completely without textual support, contends that the SEATO treaty, which was negotiated in 1954, delegates to any incumbent of the Presidency, in all perpetuity, the power to engage in war in Southeast Asia whenever he makes the appropriate findings. It gives him exclusive power to make these findings, and they are unchallengeable. He may take whatever action seems to him appropriate at that time. The State Department memorandum concedes that at the time the treaty was ratified it was not supposed that the United States would engage in land warfare in Southeast Asia, and indeed Secretary of State Dulles gave assurances that this was not contemplated.²⁹ But things change in eleven years, and a new President is free to arrive at a new judgment.

If the Senate had really done this extraordinary thing, the SEATO treaty would clearly be unconstitutional. As we shall see in the discussion of the Tonkin Gulf Resolution, the two houses of Congress cannot delegate the power to make war to the President. Whether or not the Senate has the power to make war by treaty, it cannot delegate this power by treaty.

But the Johnson administration has advanced another argument, even more novel than that founded on the SEATO treaty. President Johnson has asserted that he has the right to make war in South Vietnam and on North Vietnam because three Presidents have made "commitments" to South Vietnam.

The State Department memorandum recites several commitments.³⁰ At the conclusion of the Geneva Conference of 1954, Under-Secretary Bedell Smith said that the United States would not use force to disturb the accords, and that it "would view any renewal of the aggression in violation of the aforesaid agreements with grave concern and as seriously threatening international peace and security." President Eisenhower promised that the United States would "not use force to disturb the settlement," but said that "any renewal of Communist aggression would be viewed by us as a matter of grave concern." In October, 1954, President Eisenhower offered economic assistance to help make South Vietnam "capable of resisting attempted subversion or aggression

²⁹ *Memorandum*, p. 124.

³⁰ *Ibid.*, pp. 119, 121.

through military means." On May 11, 1957 President Eisenhower and President Ngo Dinh Diem issued a joint statement in which they spoke of "the large build-up of Vietnamese Communist military forces in North Vietnam" and "agreed that aggression or subversion threatening the political independence of the Republic of Vietnam would be considered as endangering peace and stability." On August 2, 1961, President Kennedy declared that "the United States is determined that the Republic of Vietnam shall not be lost to the Communists for lack of any support which the United States Government can render." On December 14, 1961, President Kennedy assured Diem that the United States was "prepared to help the Republic of Vietnam to protect its people and to preserve its independence."

These assurances fall short of a promise to engage in war. They could not have misled Diem or the Vietnamese, for the same Presidents stated that our assistance would not take the form of troops. It was deceptive of the State Department to omit these clarifying statements. On October 26, 1960, President Eisenhower congratulated Diem on "the fifth anniversary of the Republic of Viet-Nam" and concluded his message:

Although the main responsibility for guarding that independence will always, as it has in the past, belong to the Vietnamese people and their government, I want to assure you that for so long as our strength can be useful, the United States will continue to assist Viet-Nam in the difficult yet hopeful struggle ahead.³¹ The promise to "continue to assist" with economic aid and military instruction could not be construed as a promise to take over the principal military burden in a struggle in which the "main responsibility" lay with "the Vietnamese people and their government."

When President Johnson asserted that in making war he was fulfilling a commitment of President Eisenhower's, the former President felt obliged to make a public denial: "We said we would help that country. We were not talking about military programs but foreign aid."³²

President Kennedy, on September 2, 1963, said: "In the final analysis it is their war, they are the ones who have to win it. We can help them, we can give them equipment, we can send our men out there as advisors, but they have to win it."³³

On February 21, 1964, President Lyndon B. Johnson said: "The contest in which South Vietnam is now engaged is first and foremost a contest to be won by the government and people of that country."³⁴ On September 25, 1964, President Johnson said: "We don't want our American boys to do the fighting for Asian boys."³⁵ On September 28, 1964, he said: "What I have been trying to do with the situation that I found, was to get the boys in Vietnam to do their own fighting. . . . So we are not going going north and drop bombs."³⁶ On October 21: "We are not about to send American boys 9,000 or 10,000 miles away from home to do what Asian boys ought to do for themselves."³⁷

The commitment of three Presidents to the Vietnamese people was identical with their commitment to the American people. It was to give aid short of war.

³¹ *Public Papers of the Presidents of the United States: Dwight D. Eisenhower, 1960-61* (Washington: Office of the Federal Register, 1961), p. 808.

³² *The New York Times*, August 18, 1965.

³³ *The New York Times*, Sept. 3, 1963.

³⁴ *Ibid.*, Feb. 21, 1964.

³⁵ *Ibid.*, Sept. 26, 1964.

³⁶ *Ibid.*, Sept. 28, 1964.

³⁷ *Ibid.*, Oct. 21, 1964.

But the word commitment has more than one meaning. In the hearing of the Senate Foreign Relations Committee on February 17, 1966, Senator Hickenlooper asked: "When was the commitment made for us to actively participate in the military operations of the war as American personnel?" And General Maxwell Taylor replied: "Well, insofar as the use of our combat ground forces are [*sic*] concerned, that took place, of course, only in the spring of 1965. In the air, we had been participating more actively over 2 or 3 years."³⁸ Taylor did not misunderstand the question. He knew that Hickenlooper by "commitment" meant "pledge"; but Taylor knew of no pledge, although he had been personal military representative of President Kennedy, 1961–62, Chairman of the Joint Chiefs of Staff, 1962–64, and Ambassador to South Vietnam, 1964–65, and was currently Special Consultant to President Johnson on Vietnam. So he identified the only commitment he knew, the commitment of troops. On September 29, 1967, President Johnson enlarged his claim; his war was now to redeem "the commitment that three Presidents and a half a million of our young men have made."³⁹ The commitment of the half million young men was objective rather than subjective; they made no commitment, but they were committed by Johnson. In the President's Thanksgiving Day proclamation on November 9, 1967, the commitment became "a sacred promise";⁴⁰ on December 12, before the AFL–CIO Convention, President Johnson promised to "honor and respect our sworn commitments to protect the security of Southeast Asia."⁴¹

We have already established that the President has no right to commit, or to make a commitment to commit, a half-million men to war. He has a limited power to make executive agreements with foreign states: this is in the area of administrative relationships which carry no general legal consequences—where the latter are involved, the treaty procedure must be used. But even a treaty cannot commit our nation to war.

In his annual message to Congress on January 11, 1944, President Franklin D. Roosevelt undertook to reassure "some suspicious souls who are fearful that Mr. Hull or I have made 'commitments' for the future": "I wish to say that Mr. Churchill, and Marshall Stalin, and Generalissimo Chiang Kai-shek are all thoroughly conversant with the provisions of our Constitution. And so is Mr. Hull. And so am I."⁴² When the President pleads that he is fulfilling a Presidential military commitment, he is confessing that he is guilty of usurping power.

CHAPTER VIII: THE TONKIN GULF RESOLUTION

On several occasions during the spring and summer of 1964, South Vietnamese vessels attacked islands and coastal areas of North Vietnam. On August 2 and August 4, according to the Johnson administration, North Vietnamese patrol boats attacked two American destroyers in the Gulf of Tonkin. The administration asserted that the presence of these vessels at the time of a South Vietnamese attack on North

³⁸ *Supplemental Foreign Assistance Fiscal Year 1966—Vietnam*, Hearings before the Senate Committee on Foreign Relations, Pt. 1 (1966), p. 450.

³⁹ *Weekly Compilation of Presidential Documents*, Vol. 3, No. 40 (Oct. 9, 1967), p. 1372.

⁴⁰ *Ibid.*, No. 45 (Nov. 13, 1967), p. 1540.

⁴¹ *Ibid.*, No. 50 (Dec. 18, 1967), p. 1740.

⁴² Fred L. Israel, ed., *The State of the Union Messages of the Presidents, 1790–1966* (New York: Chelsea House, Robert Hector, 1966), Vol. 3, p. 2876.

Vietnam was pure coincidence. They were not convoying the attacking vessels but were quite independently carrying out their duty of patrolling the high seas.¹ The American destroyers suffered no hits and were reported to have sunk at least three North Vietnamese patrol boats.

On August 4 President Johnson ordered air attacks on North Vietnamese naval installations by way of reprisal for these two attacks by patrol boats and on August 5 he sent a message to the Senate. The message recited that "Our purpose is peace"; "the United States intends no rashness, and seeks no wider war." But he requested the passage of a resolution like the Formosa Resolution "to give convincing evidence to the aggressive Communist nations, and to the world as a whole, that our policy in Southeast Asia will be carried forward—and that the peace and security of the area will be preserved."² Senator Fulbright promptly introduced the Tonkin Gulf Resolution. The process of Congressional enactment was completed on August 10.³

After reciting that, as a part of a campaign of aggression that the Communist regime in North Vietnam was waging against its neighbors and the nations joined with them in defense of their freedom, North Vietnamese vessels had deliberately and repeatedly attacked United States naval vessels in international waters, and that the United States desired only that the peoples of southeast Asia "should be left in peace to work out their own destinies in their own way," the resolution said "That the Congress approves and supports the determination of the President, as Commander in Chief, to take all measures necessary to repel any armed attack against the forces of the United States and to prevent further aggression," and that "the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force" to assist Cambodia, Laos, South Vietnam, Australia, New Zealand, Pakistan, the Philippines, Thailand, and the Asian possessions of Great Britain and France to maintain their freedom if requested to do so. The language is vague, but it is very broad. The resolution did not initiate a war, but it authorized the President to initiate war "as the President determines"—that is, in his uncontrolled discretion. Senator Cooper asked Senator Fulbright, the sponsor of the resolution: "looking ahead, if the President decided that it was necessary to use such force as could lead into war, we will give that authority by this resolution?" And Fulbright replied: "That is the way I would interpret it."⁴

Two years later Fulbright had reason to complain: "I feel that I was led into the Tonkin Gulf Resolution. I should have been more intelligent, more farseeing, more suspicious."⁵ "Each time Senators have raised questions about successive escalations of the war, we have had the blank check of August 7, 1964 waved in our faces as supposed evidence of the overwhelming support of the Congress for a policy in Southeast Asia which in fact has been radically changed since the summer of 1964."⁶

The Tonkin Gulf Resolution is indeed a blank check. But our Constitution does not permit Congress to issue blank checks to determine

¹ *Congressional Record*, Vol. 110, Part 14, 88th Cong., 2d Sess. (Aug. 5, 1964). p. 18402-403.

² *Ibid.*, p. 18132.

³ 78 Stat. 384 (1964).

⁴ *Congressional Record*, p. 18409.

⁵ *The New York Times*, Nov. 24, 1966.

⁶ *The Arrogance of Power* (New York: Random House, 1966), p. 51.

policy; Congress must make the determination itself. In an early decision Chief Justice Marshall wrote:

It will not be contended, that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. . . . The line has not been sharply drawn which separates those important subjects which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made and power given to those who are to act under such general provisions to fill up the details.⁷

Clearly the war power is legislative. As we mentioned in Chapter III, Congress refused one request of President Jackson, and six requests of President Buchanan, for discretionary power to use force on the ground that war power cannot be delegated.

In 1831 the payment by France of outstanding claims for injuries to American shipping during the Napoleonic wars was agreed upon by treaty, but Louis Philippe was unable to persuade his legislature to vote the money. In his annual message to Congress on December 9, 1834, President Andrew Jackson said: "I recommend that a law be passed, authorizing reprisals upon French property, in case provision shall not be made for the payment of the debt at the approaching session of the French Chambers."⁸ On the same day Representative Claiborne complained in the House:

If this power be conferred upon him, it will be virtually conferring upon the President unconstitutional power—a power to declare war. . . . Gentlemen have read history to little effect, if they are ready to clothe a single individual with the power of making war.⁹

On January 5, 1835, Albert Gallatin wrote to Edward Everett:

In every case, particularly when hostilities are contemplated, or appear probable, no government should commit itself as to what it will do under certain future contingencies. It should prepare itself for every contingency—launch ships, raise men and money, and reserve its final decision for the time when it becomes necessary to decide and simultaneously to act. The proposed transfer by Congress of its constitutional powers to the Executive, in a case which necessarily embraces the question of war or no war, appears to me a most extraordinary proposal, and entirely inconsistent with the letter and spirit of our Constitution, which vests in Congress the power to declare war and grant letters of marque and reprisal.¹⁰

On January 6, 1835, Henry Clay presented a report for the Senate Committee on Foreign Relations, and on the basis of this report the Senate unanimously rejected Jackson's request:

Reprisals do not of themselves produce a state of public war; but they are not infrequently the immediate precursor of it. When they are accompanied with an authority, from the Government which admits them, to employ force, they are believed invariably to have led to war in all cases where the nation against which they are directed is able to make resistance. . . .

Reprisals so far partake of the character of war, that they are an appeal from reason to force; from negotiation, devising a remedy to be

⁷ *Wayman v. Southard*, 10 Wheat. 1 (1825).

⁸ James D. Richardson, ed., *Messages and Papers of the Presidents, 1789-1908* (Washington: Bureau of National Literature and Art, 1908), Vol. 3, p. 106.

⁹ *Congressional Globe*, 23d Cong., 2d Sess. (Dec. 9, 1834), p. 23.

¹⁰ John Bassett Moore, *Digest of International Law* (Washington: Government Printing Office, 1906), Vol. 7, pp. 127-8.

applied by the common consent of both parties, to self-redress, carved out and regulated by the will of one of them; and, if resistance be made, they convey an authority to subdue it, by the sacrifice of life, if necessary.

The framers of our Constitution have manifested their sense of the nature of this power, by associating it in the same clause with grants to Congress of the power to declare war, and to make rules concerning captures on land and water. . . .

In the first place the authority to grant letters of marque and reprisal being specially delegated to Congress, Congress ought to retain to itself the right of judging of the expediency of granting them under all the circumstances existing at the time when they are proposed to be actually issued. The committee are not satisfied that Congress can, constitutionally, delegate this right. It is true that the President proposes to limit the exercise of it to one specified contingency. But if the law be passed as recommended, the President might, and probably would, feel himself bound to execute it in the event, no matter from what cause, of provision not being made for the fulfillment of the treaty by the French Chambers, now understood to be in session. . . . Congress ought to reserve to itself the constitutional right, which it possesses of judging of all the circumstances by which such refusal might be attended; of hearing France, and of deciding whether, in the actual posture of things as they may then exist, and looking to the condition of the United States, of France, and of Europe, the issuing of letters of marque and reprisal ought to be authorized, or any other measure adopted.¹¹

Jackson was very unhappy with this action, and blamed the Senate for his failure to obtain immediate satisfaction; but the matter was adjusted by negotiation in 1836. Perhaps this was better than war.

In his first annual message on December 8, 1857,¹² President James Buchanan described the interest of the United States in "the freedom and security of all the communications across the isthmus" of Panama, and the danger that these communications might be interrupted either by invasions of American filibusters—these were the days of William Walker—"or by wars between the independent States of Central America." He also recited the irrelevant circumstance of the American guarantee of the neutrality and sovereignty of New Granada or Colombia. "Under these circumstances I recommend to Congress the passage of an act authorizing the President, in case of necessity, to employ the land and naval forces to carry into effect this guaranty of neutrality and protection. I also recommend similar legislation for the security of any other route across the Isthmus in which we may acquire an interest by treaty." No action was taken, and Buchanan renewed his request in his message of December 6, 1858. The routes over the Isthmus were "of incalculable importance" to the United States; they were a highway in which Nicaragua and Costa Rica had "little interest when compared with the vast interests of the rest of the world. Whilst their rights of sovereignty ought to be respected, it is the duty of other nations to require that this important passage shall not be interrupted by the civil wars and revolutionary outbreaks which have so frequently occurred in that region."

¹¹ *Ibid.*, pp. 126–7.

¹² Richardson, *op. cit.*, Vol. 5, p. 447.

Under these circumstances I earnestly recommend to Congress the passage of an act authorizing the President, under such restrictions as they shall deem proper, to employ the land and naval forces of the United States in preventing the transit from being obstructed or closed by lawless violence, and in protecting the lives and property of American citizens traveling thereupon, requiring at the same time that these forces shall be withdrawn the moment the danger shall have passed away. Without such a provision our citizens will be constantly exposed to interruption in their progress to lawless violence.

A similar necessity exists for the passage of such an act for the protection of the Panama and Tehuantepec routes.¹³

The Senate Committee on Foreign Relations reported a bill but no action was taken. On February 18, 1859 President Buchanan sent a special message repeating his request. Not only was there interruption of peaceful transit over the Isthmus; the continual revolutions produced successive confiscations of American property in Central American harbors:

As one or the other party has prevailed and obtained possession of the ports open to foreign commerce, they have seized and confiscated American vessels and their cargoes in an arbitrary and lawless manner and exacted money from American citizens by forced loans and other violent proceedings to enable them to carry on hostilities. The executive governments of Great Britain, France, and other countries, possessing the war-making power, can promptly employ the necessary means to enforce immediate redress for similar outrages upon their subjects. Not so the executive government of the United States.

If the President orders a vessel of war to any of those ports to demand prompt redress for outrages committed, the offending parties are well aware that in case of refusal the commander can do no more than remonstrate. He can resort to no hostile act. . . . The remedy for this state of affairs can only be supplied by Congress, since the Constitution has confided to that body alone the power to make war. Without the authority of Congress the Executive cannot lawfully direct any force, however near it may be to the scene of the difficulty, to enter the territory of Mexico, Nicaragua, or New Granada for the purpose of defending the persons and property of American citizens, even though they may be violently assailed whilst passing in peaceful transit over the Tehuantepec, Nicaragua, or Panama routes. He cannot, without transcending his constitutional power, direct a gun to be fired into a port or land a seaman or marine to protect the lives of our countrymen on shore or to obtain redress for a recent outrage on their property. . . .

In reference to countries where the local authorities are strong enough to enforce the laws, the difficulty here indicated can seldom happen; but where this is the case and the local authorities do not possess the physical power, even if they possess the will, to protect our citizens within their limits recent experience has shown that the American Executive should itself be authorized to render this protection. Such a grant of authority, thus limited in its extent, would in no just sense be regarded as a transfer of the war-making power to the Executive, but only as an appropriate exercise of that power by the body to whom it belongs. . . .

¹³ *Ibid.*, pp. 516-7.

I therefore earnestly recommend to Congress, on whom the responsibility exclusively rests, to pass a law before their adjournment conferring on the President the power to protect the lives and property of American citizens in the cases which I have indicated, under such restrictions and conditions as they may deem advisable.¹⁴

Senator Seward made a speech directly challenging the message; his argument on the delegation of the war power is today fully applicable to the Tonkin Gulf Resolution:

It was thought, seventy years ago, that it was a great improvement, conducive to peace, essential to the permanent stability of republican institutions, that the Executive should be destitute of the power to make war, and that this last final remedy for national grievance should never be resorted to in any case without the deliberate consent and determination of the nation itself. . . . The President of the United States now regrets that those nations living under arbitrary forms of government are safer than we are who live under this, as we thought, improved system.

But, sir, I am unable to understand the logic which brings the President of the United States to the conclusion that this application to us will not be a surrender of the war-making power. He tells us that it would not be a surrender of the war-making power; but that we should be making war ourselves. Could anything be more strange and preposterous than the idea of the President of the United States making hypothetical wars, conditional wars, without any designation of the nation against which war is to be declared; or the time, or place, or manner, or circumstance of the duration of it, the beginning or the end; and without limiting the number of nations with which war may be waged? No, sir. When we pass this bill we do surrender the power of making war or preserving peace, in each of the States named, into the hands of the President of the United States.¹⁵

Neither house acted on the President's proposal.

In his third annual message, on December 19, 1859, Buchanan made a last futile request. He asked for a law to permit him to police the Isthmus and also "to employ the naval force to protect American merchant vessels, their crews and cargoes, against violent and lawless seizure and confiscation in the ports of Mexico and the Spanish American States when these countries may be in a revolutionary condition." He argued that such a law would not involve an unconstitutional delegation of the war power:¹⁶

The chief objection urged against the grant of this authority is that Congress by conferring it would violate the Constitution; that it would be a transfer of the war-making, or strictly speaking, the war-declaring, power to the Executive. If this were well founded, it would, of course, be conclusive. A very brief examination, however, will place this objection at rest.

Congress possesses the sole and exclusive power under the Constitution "to declare war." They alone can "raise and support armies" and "provide and maintain a navy." But after Congress shall have declared war and provided the force necessary to carry it on the President, as Commander-in-Chief of the Army and Navy, can alone employ this force in making war against the enemy. This is the plain language,

¹⁴ *Ibid.*, pp. 539-40.

¹⁵ *Congressional Globe*, 35 Cong., 2d Sess. (Feb. 18, 1859), p. 1120.

¹⁶ Richardson, *op cit.*, pp. 569-70.

and history proves that it was the well-known intention of the framers, of the Constitution.

It will not be denied that the general "power to declare war" is without limitation and embraces within itself not only what writers on the law of nations term a public or perfect war, but also an imperfect war, and, in short, every species of hostility, however confined or limited. Without the authority of Congress the President cannot fire a hostile gun in any case except to repel the attacks of an enemy. It will not be doubted that under this power Congress could, if they thought proper, authorize the President to employ the force at his command to seize a vessel belonging to an American citizen which had been illegally and unjustly captured in a foreign port and restore it to its owner. But can Congress only act after the fact, after the mischief has been done? Have they no power to confer upon the President the authority in advance to furnish instant redress should such a case afterwards occur? Must they wait until the mischief has been done, and can they apply the remedy only when it is too late? To confer this authority to meet future cases under circumstances strictly specified is as clearly within the war-declaring power as such an authority conferred upon the President by act of Congress after the deed had been done. In the progress of a great nation many exigencies must arise imperatively requiring that Congress should authorize the President to act promptly on certain conditions which may or may not afterwards arise.

And Buchanan appealed to the precedent of the *Water Witch*. To obtain redress for the shelling of the *Water Witch* and the satisfaction of certain outstanding claims of American citizens against Paraguay, Congress had on June 2, 1858 by joint resolution authorized the President "to adopt such measures and use such force as in his judgment may be necessary and advisable in the event of a refusal of just satisfaction by the Government of Paraguay."

"Just satisfaction" for what? For "the attack on the United States steamer *Water Witch*" and "other matters referred to in the annual message of the President." Here the power is expressly granted upon the condition that the Government of Paraguay shall refuse to render this "just satisfaction." In this and other similar cases Congress had conferred upon the President power in advance to employ the Army and Navy upon the happening of contingent future events; and this most certainly is embraced within the power to declare war.

Now, if this conditional and contingent power could be constitutionally conferred upon the President in the case of Paraguay, why may it not be conferred for the purpose of protecting the lives and property of American citizens in the event that they may be violently and unlawfully attacked in passing over the transit routes to and from California or assailed by the seizure of their vessels in a foreign port? To deny this power is to render the Navy in a great degree useless for the protection of the lives and property of American citizens in countries where neither protection nor redress can be otherwise obtained.

The case of the *Water Witch* was contingent legislation of a sort. Congress had authorized the President to make war unless Paraguay averted the war by submission—for that was what "just satisfaction" meant. But it was not a precedent for Buchanan's request. In the case of the *Water Witch*, the occasion for war was in the past. Congress had determined that the shelling of the *Water Witch* was a *casus belli*,

and that the use of force against Paraguay was feasible and in accord with the national interest under existing circumstances. But in his request for power to police the Isthmus routes and foreign harbors Buchanan was asking that the President be authorized to determine on future occasions whether circumstances as yet unknown constituted a *casus belli*, and whether under these circumstances it was desirable or prudent to use force. He was asking Congress to grant him the power of decision for war or peace.

Suppose, on the other hand, that Congress should pass genuine contingent legislation requiring rather than permitting the President to go to war when specified events occurred in the future. Henry Clay had considered it a peculiarly unfortunate feature of Jackson's proposal for reprisal on French shipping that the President might interpret the legislation as mandatory. He might feel obliged to go to war when stated events occurred, regardless of the circumstances. According to Clay, the Constitution requires that Congress itself appraise the immediate circumstances before the nation voluntarily enters into a state of war. Therefore Congress could not authorize war with France without hearing what France had to say as to the reasons for the failure to pay the claims, and without deciding that "in the actual posture of things as they may then exist," including the contemporary state of international politics, and in particular the attitude of Great Britain, a limited war was the wisest course of action.

Clay's argument went beyond the rule against the delegation of legislative power. He argued, in effect, that Congress itself cannot make a declaration of war which is to come into effect upon the occurrence of stipulated facts in the future, because war is an enterprise in which all the contemporary circumstances must be weighed.

Almost from the beginning of our history, in the exercise of other powers than the war power, Congress has passed laws that are to come into effect when a given state of affairs exists, and has authorized the President to determine the existence of the relevant facts and to invoke the law by proclamation. But there is a world of difference between contingent legislation in the exercise of the power over interstate and foreign commerce and a contingent declaration of war. In the first case, a rule of conduct for citizens is established by Congress and is called into play by the President. This takes place within a legal order shaped and controlled by Congress itself. Under these circumstances, Congress can foretell the consequences of the delegation and is genuinely determining the policy to be applied. In the second case, the invocation of a conditional declaration of war changes the legal status of the nation itself. It changes the status and relations of the nation in an international order whose significant details, perhaps even its major outlines, change from month to month or day to day. The posture of international affairs in the future cannot be known to Congress at the time the resolution is passed. If Congress makes a contingent declaration of war, it is not determining policy for the future; it is casting dice. Henry Clay's ultimate position was that Congress is authorized to declare only present and not future wars. Surely this is what the framers intended.

Unless one considers the secret resolution of 1811 to fall in that category,¹⁷ Congress has never passed a declaration of war contingent upon the occurrence of specified future events. In recent years, however, it has passed no less than four laws purporting to give the Presi-

¹⁷ 3 Stat. 471 (Jan. 15, 1811).

dent the option of making war on future occasions. These are clearly uncontrolled delegations of the war power.

Article 43 of the United Nations Charter provides for agreements between the Security Council and member states by which the latter are to promise to supply armed forces for military action ordered by the Security Council to maintain or restore international peace and security. The United Nations Participation Act, passed by Congress in 1945, authorized the President to negotiate such an agreement with the Security Council. If it should be confirmed by Congress by act or joint resolution, "The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under Article 42 of said Charter and pursuant to such special agreement or agreements the armed forces, facilities, or assistance provided for therein."¹⁸ The act does not say that the President must make the force available. It seems to assume that he may do so or fail to do so as he thinks best. If he chooses to do so, he need not seek the approval of Congress. This is indisputably a delegation of the power to make war.

Champions of the United Nations are likely to resent this criticism. But the Constitution does not forbid support for the United Nations. It merely says that it is for Congress rather than for the President to afford that support, and that Congress may not transfer to the President the duty of determining when support should be afforded.

Secretary of State John Foster Dulles was responsible for two other delegations. In 1955 President Eisenhower requested what has come to be known as the Formosa Resolution. After cursory hearings and limited debate, Congress resolved "That the President of the United States be and he hereby is authorized to employ the Armed Forces of the United States as he deems necessary for the specific purpose of securing and protecting Formosa and the Pescadores against armed attack, this authority to include the securing and protecting of such related positions and territories of that area now in friendly hands and the taking of such other measures as he judges to be required or appropriate in assuring the defense of Formosa and the Pescadores."¹⁹ Dulles was also responsible for the passage of the Middle East Resolution of March 9, 1957. The resolution recited the determination of the United States to preserve "the independence and integrity of the nations of the Middle East" and provided:

To this end, if the President determines the necessity thereof, the United States is prepared to use armed forces to assist any nation or group of nations requesting assistance against armed aggression from any country controlled by international communism. . . .²⁰

The Tonkin Gulf Resolution is the fourth attempt of Congress to transfer its constitutional responsibility to the President.

Let us assume that Henry Clay was wrong, and that Congress has the power to declare future wars which are contingent upon the President's finding of appropriate facts recited in the resolution. These delegations do not meet the tests which courts apply to legislative delegations in other areas.

Problems of two sorts have arisen in connection with domestic legislation. In the case of contingent legislation, the Congress itself enacts

¹⁸ 22 U.S.C. 287d; 59 Stat. 621 (1945) as amended 63 Stat. 735 (1949).

¹⁹ 69 Stat. 5.

²⁰ 71 Stat. 5.

the provisions of a law which is to come into effect upon the occurrence of recited circumstances, and the President invokes the law when those circumstances occur. In the case of delegation of the rule-making power, Congress recites a general policy to be pursued, and authorizes the President to make detailed rules putting that policy into effect.

A good deal of discretion can be allowed to the President in finding the facts. In *Field v. Clark*, in 1892,²¹ the Court upheld a grant of power to the President to remove certain foods and hides from the free list in the case of an exporting nation levying duties on our goods which "he may deem to be reciprocally unequal and unreasonable"; upon such a finding, duties recited in the statute were to attach:

That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution. The act of October 1, 1890, in the particulars under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation. . . . Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. . . . As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact, and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. . . . He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.

Delegation of the rule-making power was upheld in *United States v. Grimaud* in 1911.²² The Supreme Court upheld an act authorizing the Secretary of Agriculture to make rules concerning public forests and forest reservations "to regulate their occupancy and use, and to preserve the forests thereon from destruction." The Court stated the controlling considerations:

In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions, Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power.

These cases make the relationship unmistakable. Congress is the principal, the President is the agent. If Congress determines the general policy to be pursued, it may authorize the President to determine the facts which call the Congressional policy into play, or to make detailed rules which apply the policy established by Congress to particular sets of facts.

But Congress may not pass contingent legislation without specifying the circumstances in which it is to be invoked, nor may it authorize the President to make rules on a topic without supplying standards to guide him. To do either of these things would be to attempt to delegate legislative power.

The first situation was presented in 1935 in *Panama Refining Company v. Ryan*.²³ The National Recovery Act of 1933 authorized the President to forbid the interstate transportation of petroleum pro-

²¹ 143 U.S. 649.

²² 220 U.S. 506.

²³ 293 U.S. 388.

duced in excess of the amount permitted to be produced by state law in the state of production, and the Panama Refining Company brought an action to enjoin the enforcement of a Presidential order. The Court said:

Section 9 (c) is brief and unambiguous. It does not attempt to control the production of petroleum and petroleum products within a state. It does not seek to lay down rules for the guidance of state legislators or state offices. It leaves to the states and to their constituted authorities the determination of what production shall be permitted. It does not qualify the President's authority by reference to the basis or extent of the state's limitation of production. Section 9 (c) does not state whether or in what circumstances or under what conditions the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in areas of the state's permission. It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in section 9 (c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit.²⁴

Justice Cardozo dissented on the theory that the recitation of the purposes of the act supplied a standard to govern the President. But he joined in the unanimous decision in *Schechter Poultry Company v. United States*²⁵ in the same year that the delegation of code-making authority to the President in the National Recovery Act was unconstitutional. The only standard to guide the President was that the codes "tend to effectuate the policy of this title." The policy itself was stated as a number of happy outcomes, including industrial recovery, increased consumption, improvement of the condition of labor, and the conservation of natural resources. Surely Chief Justice Hughes was right in saying that Congress had authorized the President to approve as law whatever codes appeared to him to be "wise and beneficent measures of the government of trades and industries in order to bring about their rehabilitation, correction, and development, according to the general declaration of policy in section 1."²⁶ Surely Justice Cardozo was right in calling this a delegated power "unconfined and vagrant."²⁷

Three cases decided during the Second World War upheld acts of Congress which authorized administrative rule-making. For our purposes it is decisive that the Court applied to these statutes, which were passed under the war power, the orthodox tests which govern the delegation of legislative power in domestic affairs.

On March 21, 1941, Congress authorized the President or a designated agent to establish military zones and to prescribe the terms on which any person should "enter, remain in, leave, or commit any act in such a zone": violation of such an order was made criminal. Hirabayashi ignored a curfew for persons of Japanese origin established by the commanding general of the Pacific Coast zone. The language of the

²⁴ *Id.* at 415.

²⁵ 295 U.S. 495.

²⁶ *Id.* at 535.

²⁷ *Id.* at 551.

delegation seems to be excessively broad, but in a troubled and confused opinion Chief Justice Stone reduced it to constitutional dimensions.²⁸ All that was involved was a curfew order, and Congress had been "advised that curfew orders were among those intended, and was advised also that regulation of citizen and alien Japanese alike was contemplated."²⁹ Since Congress had contemplated the issuance of a curfew order when it passed the statute, Stone apparently felt that it had discharged its duty of fixing policy.³⁰

The Emergency Price Control Act of 1942, which was also adopted under the war power, was challenged twice on the theory that it unlawfully delegated legislative power. Each time the Court applied the traditional formula and found it to be satisfied.

The first case, *Yakus v. United States*,³¹ was a prosecution for selling at a price in excess of that fixed by the Administrator of the Office of Price Administration under authority granted in the act. Chief Justice Stone held that Congress had discharged the legislative function, as it must do, and had left to the Administrator only the task of applying its policy.

Congress enacted the Emergency Price Control Act in pursuance of a defined policy and required that the prices fixed by the Administrator should further that policy and conform to standards prescribed by the Act. . . .

The Act is thus an exercise by Congress of its legislative power. In it Congress has stated the legislative objective, has prescribed the method of achieving that objective—maximum price-fixing—and has laid down standards to guide the administrative determination of both the occasions for the exercise of the price-fixing power, and the particular prices to be established. Compare *Marshall Field and Co. v. Clark*. . . .

The Act is unlike the National Industrial Recovery Act of June 16, 1933, . . . considered in *A.L.A. Schechter Poultry Company v. United States*. . . .³²

The Act also authorized the Administrator to fix maximum rents under certain circumstances. In *Bowles v. Willingham*³³ Justice Douglas wrote the opinion upholding this feature of the act:

The considerations which support the delegation of authority under this Act over commodity prices (*Yakus v. United States*) are equally applicable here. The power to legislate which the Constitution says shall be vested in Congress (Art. 1 § 1) has not been granted to the Administrator. Congress in § 1(a) of the Act has made clear its policy of waging war on inflation. In § 2(b) it has defined the circumstances

²⁸ *Hirabayashi v. United States*, 320 U.S. 81 (1943).

²⁹ *Id.* at 91.

³⁰ On the other hand, there is perplexing language which seems to echo the *Curtiss-Wright* case, which is discussed below, note 35: "The question then is not one of Congressional power to delegate to the President the promulgation of the Executive Order, but whether, acting in cooperation, Congress and the Executive have constitutional authority to impose the curfew restriction here complained of." *Id.* at 91-2. And Stone silently alters the law of separability in the field of delegation of legislative power. The earlier cases had implicitly held that one could not give effect to an overbroad statute within the range of Congressional intention; it was void on its face. But here Stone enforces a rule made under a confessedly excessive delegation because the promulgation of the rule was contemplated by Congress at the time the act was passed.

³¹ 321 U.S. 414 (1944).

³² *Id.* at 423.

³³ 321 U.S. 503 (1944).

when its announced policy is to be declared operative and the method by which it is to be effectuated. Those steps constitute the performance of the legislative function in the constitutional sense. . . .

There is no grant of unbridled administrative discretion as appellee argues. . . .³⁴

The test acknowledged and applied in all these cases is not satisfied by the Formosa Resolution, the Middle East Resolution, or the Tonkin Gulf Resolution. These resolutions do not say: If the President finds that aggression has occurred, he shall make war. The Formosa Resolution says: If Formosa and the Pescadores are attacked, the President is "authorized to employ the Armed Forces"—that is, he is to go to war or not—"as he deems necessary." The Middle East Resolution says: If the President shall find that aggression has occurred, there is to be war "if the President determines the necessity thereof." The Tonkin Gulf Resolution says: "Aggression has occurred," and there is likely to be future aggression; there shall or shall not be war, "as the President determines," of such character and in such parts of Southeast Asia as the President shall determine. In none of the three cases could it be said of the President, in the language of *Field v. Clark*, above, that "He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect." Congress did not express a will as to war or peace. Not only the language of the resolutions but the debates show beyond doubt that Congress intended to transfer the power of decision to the President. This was an illegitimate purpose, and the resolutions are void.

Almost no one would wish to revise these resolutions by eliminating Presidential discretion and making war perfectly automatic upon the occurrence of a future event. This could appeal only to the admirers of Herman Kahn's Doomsday Machine, which is to be set irrevocably to blow up the earth when the Soviet Union violates one or another ultimatum.³⁵ Henry Clay was perfectly right when he said that the decision for war must be taken contemporaneously with the declaration of war, in the light of current circumstances. But he was right also in saying that the decision for war must be taken by Congress, to whom alone the Constitution gives the responsibility for evaluating the occasion and the circumstances and for making the fateful choice.

All this seems pellucidly clear, but it is necessary to consider one eccentric Supreme Court opinion, *United States v. Curtiss-Wright Export Corporation*,³⁶ decided in 1937, for there the Court did in fact say that the rule against the delegation of legislative power does not apply in foreign affairs. The case did not involve the war power, but the power over foreign commerce; and the cases decided under the war power reviewed above, which held that the rule against delegation applies in this area, were subsequent to the *Curtiss-Wright* case. But since *Curtiss-Wright* dealt with the problem of delegation, and in a startling manner, it should be considered.

In 1934 Congress passed a joint resolution authorizing the President, if he should find that the prohibition of the sale of arms in the United States to the belligerents in the Gran Chaco war would contribute to the restoration of peace, to prohibit such sale by proclamation. Violation of the prohibition was made a crime. *Curtiss-Wright*

³⁴ *Id.* at 514.

³⁵ *On Thermonuclear War* (Princeton: Princeton University Press, 1960), pp. 145-9.

³⁶ 299 U.S. 304.

was indicted for conspiring to sell arms to Bolivia; it demurred to the indictment, arguing that the resolution unconstitutionally delegated legislative power to the President.

The resolution might have been sustained as contingent legislation: Congress had specified both the purpose of Presidential action and the means. But Justice Sutherland, who wrote the majority opinion, wished to introduce a cherished theory into constitutional law. Whether or not the joint resolution would have been invalid if its operations were internal, he said, it was not "vulnerable to attack under the rule that forbids a delegation of the lawmaking power" because its purpose was "to affect a situation entirely external to the United States, and falling within the category of foreign affairs."

This was because sovereignty was of two sorts, external and internal. At the Revolution the external sovereignty of the British crown passed to the United States; internal sovereignty passed to the several states. By adopting the Constitution, the several states transferred a portion of their internal sovereignty to the Union, but the Constitution had no effect upon the external sovereignty which the Union already possessed; therefore the constitutional rule against the delegation of legislative power could not apply to exercises of external sovereignty.

The notion that "the states severally never possessed international powers" would have surprised the signers of the Declaration of Independence, for that document reads:

We therefore, the representatives of the United States of America, in General Congress, assembled, . . . do . . . solemnly publish and declare, that these united colonies are, and of right ought to be free and independent states; . . . and that as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do.

Sutherland's theory is not only historically but theoretically unsound. The notion that sovereignty can come in two parts is absurd, for the reason Sutherland himself gives: "A political society cannot endure without a supreme will somewhere." As Hans Kelsen puts it, a coherent legal order must derive from a single *Grundnorm*;³⁷ to use another figure, it must rise pyramidally to a single apex. For us, the *Grundnorm* is the Constitution, and even for Justice Sutherland, for he says that external sovereignty remained in the Union "save in so far as the Constitution in express terms qualified its exercise." The Constitution entirely qualified its exercise. It created the several organs of national government and assigned powers to each. It apportioned the powers of "external sovereignty"—treaties and war and foreign commerce. War and foreign commerce it assigned to Congress in Article I of the Constitution, which begins with the words which forbid the delegation of Congressional power: "The legislative power herein granted shall be vested in a Congress."

But even if Sutherland's reasoning would hold water the *Curtiss-Wright* case would not be a precedent for the Tonkin Gulf Resolution. The joint resolution involved in the *Curtiss-Wright* case did not give the President a choice. If he found that prohibition on the sale of arms would help restore peace, he was required to proclaim the prohibition. The Tonkin Gulf Resolution, after stating the objective, provides for

³⁷ See Hans Kelsen, *General Theory of Law and State* (Cambridge: Harvard University Press, 1945).

action only at the President's option. Nothing in Sutherland's opinion in the *Curtiss-Wright* case suggests that when the Congress has specified the goal the President is free to pursue it or not as he chooses.

Quite aside from this, the foundation has been cut from under the *Curtiss-Wright* case, as well as the few other cases which look in the same direction. The notion of extra-constitutional legal power was always nonsense, and it was decisively rejected by the Supreme Court in *Reid v. Covert*³⁸ in 1957. Holding that the allocations of power in the Constitution—in this case, Article III, assigning judicial power to the constitutional courts—and the prohibitions of the Constitution—in this case, the Sixth Amendment, guaranteeing jury trial in criminal cases—invalidated an act of Congress which provided for trial by court martial of civilian dependents of military personnel abroad, Justice Black said: "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."³⁹

As we have said, the joint resolution in the *Curtiss-Wright* case was passed under the commerce power. In *Kent v. Dulles*,⁴⁰ decided in 1958, another delegation of rule-making power in the field of foreign commerce was held to be an impermissible delegation on the principle of *Panama Refining Company v. Ryan*.

In 1926 Congress had provided that "The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe." In 1952 the Secretary of State, acting under Presidential authorization, made the issuance of a passport conditional upon the satisfaction of tests as to political belief and affiliation. Rockwell Kent refused on principle to take an oath as to present or past membership in the Communist party and was denied a passport. The majority of the Supreme Court held that the Secretary's rules were not authorized by Congress. If Congress delegates power, "the standards must be adequate to pass scrutiny by accepted tests. *Panama Refining Co. v. Ryan*." Where a constitutional right, such as that to travel, is involved, delegations will be construed narrowly. So construed, the statute can be taken to authorize rules only on the two topics with which Congress was familiar in 1926: citizenship and criminality. To save the statute, the delegation must be interpreted to be confined to these topics. Therefore Acheson's rules were invalid. It does not disturb our argument that in 1965, *Zemel v. Rusk*,⁴¹ the Court discovered that Congress in 1926, or at any rate at the reenactment of the passport legislation of 1952, had contemplated executive rule-making on three subjects rather than two. The third was the prohibition of travel to designated areas. The delegation was therefore held to be valid as to this third topic. The majority did not disagree with the principles, but only disputed the relevance, of Justice Black's dissent: "For Congress to attempt to delegate such an undefined law-making power to the Secretary, the President, or both, makes applicable to this 1926 Act what Mr. Justice Cardozo said about the National Industrial Recovery Act: 'This is delegation running riot. No such plenitude of power is susceptible of transfer.'"

The attempt of Congress to transfer its power and responsibility to make war to the President is constitutionally unauthorized and destroys the political system envisaged by the framers.

³⁸ 354 U.S. 1.

³⁹ *Id.* at 5-6.

⁴⁰ 357 U.S. 116.

⁴¹ 381 U.S. 1.

STATEMENT BY WILLIAM H. REHNQUIST, ASSISTANT ATTORNEY GENERAL OFFICE OF LEGAL COUNSEL, ON THE PRESIDENT'S CONSTITUTIONAL AUTHORITY TO ORDER THE ATTACK ON THE CAMBODIAN SANCTUARIES*

This paper is addressed to the question of whether President Nixon had constitutional authority to order the attack on the Communist sanctuaries in Cambodia. This question poses a number of related issues concerning the constitutional allocation of the war-making authority between the President and Congress. Briefly stated, it is my belief that the President's action was a valid exercise of his constitutional authority as Commander-in-Chief to secure the safety of American forces lawfully committed to combat pursuant to congressional authorization.

Before turning to a more detailed discussion of the issue presented, let me advert briefly to the provisions of the Constitution itself with respect to the war power, and to the debates of the Framers on this subject. Article I, section 8 provides that Congress shall have the power "to declare war." Article II, section 2 designates the President as Commander-in-Chief of the Armed Forces. This textual allocation of authority readily suggests that a division of the Nation's war power between the President and Congress was intended. An examination of the proceedings of the Constitutional Convention confirms that suggestion. Such an examination also indicates that the Framers did not intend to precisely delimit the boundary between the power of the Executive Branch and that of the Legislative Branch. While rejecting the traditional power of kings to commit unwilling nations to war, they at the same time recognized the need for quick Executive response to rapidly developing international situations.

It is interesting to note that the proposal called up before the Convention on Friday, August 17, 1787, was cast in terms of conferring upon Congress the power "to make war," rather than "to declare war." During the debate, Charles Pinckney urged that the war-making power be confided to the Senate alone, while Pierce Butler asked that the power be vested in the President. James Madison and Elbridge Gerry then jointly moved to substitute the word "declare" for the word "make," thus in their words "leaving to the Executive the power to repel sudden attacks." Rufus King supported the substitution of the word "declare," urging that the word "make" might be understood to mean "conduct war," which latter he believed to be an Executive function.

With only New Hampshire dissenting, it was agreed that the grant to Congress should be of the power to "declare" war. Pinckney's motion to strike out the whole clause, and thereby presumably leave the way

*Before the Society of International Law, June 16, 1970.

open to vest the entire war-making power in the Executive, was then defeated by a voice vote.

The Framers here, as elsewhere in the Constitution, painted with a broad brush, and it has been left to nearly 200 years of interpretation by each of the three coordinate branches of the national government to define with somewhat more precision the line separating that which the President may do alone from that which he may do only with the assent of Congress.

I think there are at least three propositions that may be deduced from the Nation's nine score years of operation under this constitutional mandate. The first is that the notion that the United States may lawfully engage in armed hostilities with a foreign power only if Congress has formally declared war is wrong. Our constitutional history is directly to the contrary. It has been recognized from the earliest days of the Republic by the President, by the Congress, and by the Supreme Court that the United States may lawfully engage in armed hostilities without any formal declaration by Congress. Our history is replete with instances of "undeclared wars," from the war with France in 1798 through 1800, to the Vietnamese War. The Fifth Congress passed a law contained in the first book of the Statutes at Large, authorizing President Adams to "instruct the commanders of the public armed vessels which are, or which shall be employed in the service of the United States, to subdue, seize and take any armed French vessel, which shall be found within the jurisdictional limits of the United States, or elsewhere, on the high seas"

The President proceeded to carry out congressional instructions, and such naval seizures were not uncommon during the period of the undeclared war with France. The Supreme Court in a case arising out of this undeclared war, recognized the difference between what is called "solemn war," which required a declaration by Congress, and "imperfect" war, which did not, in *The Eliza*, 4 Dall. 37.

It simply will not do, then, either as a matter of constitutional law or as a matter of historical practice, to say that armed hostilities engaged in by the United States in the absence of a declaration of war by Congress are unlawful. To say this by no means answers the question as to the extent of the President's constitutional authority, but it does focus the discussion on substance rather than form.

The second proposition deductible from constitutional history is that the designation by the Constitution of the President as Commander-in-Chief is a grant of substantive authority, rather than merely a high sounding title. This proposition is supported by not merely countless examples from our Nation's history, but by more than one judicial comment on the subject. Chief Justice Marshall, writing for the Court in *Little v. Barreme*, 2 Cranch. 170, spoke of the power of the President to order the seizure of a ship on the high seas in a situation where Congress has not specified the procedure:

It is by no means clear that the President of the United States, whose high duty it is to "take care that the laws be faithfully executed," and who is Commander-in-Chief of the Armies and Navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce. 2 Cranch. at 177.

Justice Grier, speaking for the Supreme Court in its famous decision in the *Prize Cases*, 2 Black 635, likewise viewed the President's designation as Commander-in-Chief as being a substantive source of authority on which he might rely in putting down rebellion:

Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents is a question to be decided *by him* and this Court must be governed by the decisions and acts of the political departments of the government to which this power was entrusted. "He must determine what degree of force the crisis demands." 2 Black 635, 670.

Lest it be thought that Chief Justice Marshall and Justice Grier are not relevant to the 20th Century, Justice Jackson, concurring in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 645 (1952), expressed a similar thought:

We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander-in-Chief. I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. . . .

The third proposition that our constitutional and historical experience supports is this: at the very heart of the Presidential power as Commander-in-Chief is his sole authority to determine the tactics and strategy which shall govern the way in which hostilities once commenced are conducted. This is by no means the whole of his authority as Commander-in-Chief, but it is the least disputable part.

Presidents throughout our history have done a good deal more than just make decisions as to *how* wars shall be fought. They have sent American armed forces into conflict with foreign powers on their own initiative. They have also deployed American armed forces outside of the United States on occasion in a way which invited hostile retaliation from a foreign power. Together with the authority to conduct armed conflict already authorized by Congress, these represent three separate facets of the historical exercise of the power as Commander-in-Chief by various Presidents—the power to deploy armed forces outside of the United States; the power to engage United States armed forces in conflict with a foreign nation; and the power to determine how a war, once initiated, shall be conducted.

Congress has on some of these occasions acquiesced in the President's action without formal ratification; on others it has ratified the President's action; and on still others it has taken no action at all. On several of the occasions, individual members of Congress, and, at the close of the Mexican War, one House of Congress on a preliminary vote, have protested Executive use of the armed forces. While a particular course of Executive conduct to which there was no opportunity for the Legislative Branch to effectively object cannot conclusively establish a constitutional precedent in the same manner it would be established by an authoritative judicial decision, a long continued practice on the part of the Executive, acquiesced in by the Congress, is itself some evidence of the existence of constitutional authority to support such a practice. As stated by Justice Frankfurter in his concurring opinion in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 610:

The Constitution is a framework for government. Therefore the way the framework is consistently operated fairly establishes that it has operated according

to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of the text or supply them. 348 U.S. at 610.

The historical examples have been marshalled in numerous recent studies of the President's power, and I will but summarize some of them briefly.

President Jefferson, in 1801, sent a small squadron of American naval vessels into the Mediterranean to protect United States commerce against the Barbary pirates. He was of the view that for these ships to take offensive, as opposed to defensive, action, congressional action would be necessary.

In 1845 President Polk ordered military forces to the coast of Mexico and to the western frontier of Texas in order to prevent any interference by Mexico with the proposed annexation of Texas to the United States. Following annexation, Polk ordered General Zachary Taylor to march from the Nueces River which Mexico claimed as the southern border of Texas, to the Rio Grande River, which Texas claimed as her southern boundary, and beyond. While so engaged, Taylor's forces encountered Mexican troops, and hostilities between the two nations commenced on April 25, 1846.

There had been no prior authorization by Congress for Taylor's march south of the Nueces. Justice Grier, in his opinion in *The Prize Cases*, commented on this fact, stating:

The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the act of Congress of May 13, 1846, which recognized "a state of war as existing by the act of the Republic of Mexico" 2 Black 634.

In 1854, President Pierce approved the action of the naval officer who bombarded Greytown, Nicaragua in retaliation against a revolutionary government that refused to make reparations for damage and violence to United States citizens. This action was upheld by Justice Samuel Nelson, a Justice of the Supreme Court of the United States, sitting as a Circuit Justice in *Durand v. Hollis*, 4 Blatch. 451 (1860). In his opinion in that case, Justice Nelson said:

The question whether it was the duty of the President to interpose for the protection of the citizens at Greytown against an irresponsible and marauding community that had established itself there, was a public political question, in which the government, as well as the citizens whose interests were involved, was concerned, *and which belong to the Executive to determine*; and his decision is final and conclusive, and justified the defendant in the execution of his orders as Secretary of the Navy. 4 Blatch. 454-455 (emphasis supplied).

In April, 1861, President Lincoln called for 75,000 volunteers to suppress the rebellion by the southern states, and proclaimed a blockade of the Confederacy. These actions were taken prior to their later ratification by Congress in July, 1861. The Supreme Court upheld the validity of the President's action in proclaiming a blockade in the *Prize Cases*.

In 1900, President McKinley sent an expedition of 5000 United States troops as a component of an international force during the Boxer Rebellion in China. While Congress recognized the existence of the conflict by providing for combat pay, it neither declared war nor formally ratified the President's action.

Similar incidents in Central America took place under the administrations of Presidents Theodore Roosevelt, Taft and Wilson. Naval or armed forces were sent to Panama, Nicaragua, and twice to Mexico

in the first two decades of the Twentieth Century. On none of these occasions was there prior congressional authorization.

Prior to the Vietnam conflict, the most recent example of Presidential combat use of American forces without congressional declaration of war was President Truman's intervention in the Korean Conflict. In many senses, this is undoubtedly the high water mark of Executive exercise of the power of Commander-in-Chief to commit American forces to hostilities.

Following the invasion of South Korea by the North Koreans in June, 1950, and a request for aid by the United Nations Security Council, President Truman ordered air and sea forces to give South Korean troops cover and support and ordered the Seventh Fleet to guard Formosa. Ultimately 250,000 troops were engaged in the Korean War which lasted for more than three years.

President Truman relied upon the United Nations Charter as a basis for his action, as well as his power as Commander-in-Chief. The fact that his actions were authorized by the United Nations Charter, however, does not reduce the value of the incident as a precedent for Executive action in committing United States armed forces to extensive hostilities without a formal declaration of war by Congress. The United Nations Charter was ratified by the Senate and has the status of a treaty, but it does not by virtue of this fact override any constitutional provision. *Geofroy v. Riggs*, 133 U.S. 258; *Reid v. Covert*, 354 U.S. 1. If a congressional declaration of war would be required in other circumstances to commit United States forces to hostilities to the extent and nature of those undertaken in Korea, the ratification of the United Nations Charter would not obviate a like requirement in the case of the Korean Conflict.

Presidents have likewise used their authority as Commander-in-Chief to deploy United States forces throughout the world. Critics of President Wilson claimed that his action in arming American merchant vessels in early 1917 precipitated our entry into the First World War. Similarly, President Roosevelt's critics have asserted that various actions he took to aid the Allies in the year 1941 played a part in our involvement in the Second World War. Whatever substance there may be to these criticisms, the Presidential actions stand as the constructions placed by these two Presidents on their power as Commander-in-Chief of the Armed Forces.

The third facet of the power of Commander-in-Chief is the right and obligation to determine how hostilities, once lawfully begun, shall be conducted. This aspect of the President's power is one which is freely conceded by even those students who read the Commander-in-Chief provision least expansively. Indeed, it has seldom, if ever, been seriously challenged. Chief Justice Chase, concurring in *Ex parte Milligan*, 4 Wall. 2, at 139, said:

Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, *except such as interferes with the command of the forces and conduct of campaigns. That power and duty belongs to the President as Commander-in-Chief.* [Emphasis supplied.]

In the First World War, for example, it was necessary to make the tactical decision whether the United States troops in France would

fight as a separate command under General Pershing, or whether United States divisions should be incorporated in existing groups or armies commanded by French or British generals. President Wilson and his military advisors decided that United States forces would fight as a separate command.

In the Second World War, not only similar military decisions on a global scale were required but also decisions that partook as much of political strategy as they did of military strategy. I would briefly mention a number of these: Should the United States concentrate its military and materiel resources on either the Atlantic or Pacific fronts to the exclusion of the other, or should it pursue the war on both fronts simultaneously? Where should the reconquest of Allied territories in Europe and Africa which had been captured by the Axis powers begin? What should be the goal of the Allied powers? It will readily be recalled by many of us that decisions such as these were reached by the Allied commanders-in-chief, and chief executive officers of the Allied nations, without any formal congressional participation. The series of conferences attended by President Roosevelt and President Truman ultimately established the Allied goals in fighting the Second World War, including the demand for unconditional surrender on the part of the Axis nations. Similar strategic and tactical decisions were involved in the undeclared Korean War. Questions such as whether the United States forces should pursue Korean forces in North Korea and as to whether American Air Force planes should pursue Communist planes north of the Yalu River were made by the President as Commander-in-Chief without formal congressional participation.

The power to make tactical and strategic decisions regarding the prosecution of the military effort on the battlefield is so clear as to admit of little question. Indeed, if the designation in the Constitution of the President as Commander-in-Chief means anything, it must mean that he alone directs the military operation in the field.

Having thus established (at least to my own satisfaction) first, that extensive participation of United States forces in hostilities against a foreign power do not require a declaration of war by Congress, and second, that the Presidential power as Commander-in-Chief includes the power to decide how hostilities once commenced shall be conducted, I turn now to the particulars of Vietnam and Cambodia. First, we must inquire whether Congress has authorized the hostilities in Vietnam which have been going on for the last six years. If it has, this fact will make some difference in how one evaluates the legality of President Nixon's Cambodian decision of two months ago. Whatever may be the contours of the President's powers as Commander-in-Chief in the absence of congressional authorization, it is clear that Congress can, by authorizing Presidential action, remove any doubt as to its constitutional validity. Thus, in enacting the Gulf of Tonkin Resolution, Congress noted that whatever the limits the President's authority acting alone, "there can be no doubt" of constitutional authority when the President and Congress are acting together. H. Rept. 1708, 88th Cong., 2d, Sess. 4.

Congress may of course authorize Presidential action by declaration of war. But it is abundantly clear that its authorization of Presidential action may take other forms. From the example of the Fifth

Congress' delegation to President Adams of the power to stop French vessels on the high seas, through the legislative acts authorizing President Eisenhower to use troops in Lebanon and in Formosa, and authorizing President Kennedy to use armed forces in connection with the Cuban missile crisis, to the Gulf of Tonkin Resolution in 1964, both Congress and the President have made it clear that it is the substance of Congressional authorization, and not the form which that authorization takes, which determines the extent to which Congress has exercised its portion of the war power.

The notion that an advance authorization by Congress of military operations is some sort of an invalid delegation of congressional war power is untenable in the light of the decided cases. While *Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935), held that Congress in delegating powers dealing with domestic affairs must establish standards for administrative guidance, this principle does not obtain in the field of external affairs. The Supreme Court in *United States v. Curtiss-Wright Corporation*, 299 U.S. 304, made this clear:

Whether if the Joint Resolution had related solely to internal affairs it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive, we find it unnecessary to determine. The whole aim of the Resolution is to affect a situation entirely external to the United States, and falling within the category of foreign affairs. . . . 299 U.S. at 315.

It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The power to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. 299 U.S. at 318.

In August, 1964, at the request of President Johnson following an attack on American naval vessels in the Gulf of Tonkin, Congress passed the so-called Gulf of Tonkin Resolution. That Resolution approved and supported the determination of the President "to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression." It also provided that the United States is "prepared as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom."

While the legislative history surrounding the Gulf of Tonkin Resolution may be cited for a number of varying interpretations of exactly what Congress was authorizing, it cannot be fairly disputed that substantial military operations in support of the South Vietnamese were thereby authorized. Steadily increasing numbers of United States Armed Forces were sent into the Vietnamese combat during the years following the passage of the Gulf of Tonkin Resolution. American Air Force planes bombed not only South Vietnam, but North Vietnam. When President Nixon took office in January, 1969, he found nearly half a million combat and supporting troops engaged in the field in Vietnam. His predecessor, acting under the authorization of the Gulf of Tonkin Resolution, had placed these troops in the field, and I for one have no serious doubt that Congress and the President together had exercised their shared war power to lawfully bring about this situation.

President Nixon continued to maintain United States troops in the field in South Vietnam, in pursuance of his policy to seek a negotiated

peace which will protect the right of the South Vietnamese people to self-determination. He has begun troop withdrawals, but hostile engagements with the enemy continue. He has an obligation as Commander-in-Chief to take what steps he deems necessary to assure the safety of American armed forces in the field. On the basis of the information available to him, he concluded that the continuing build-up of North Vietnamese troops in Sanctuaries across the Cambodian border posed an increasing threat to both the safety of American forces, and to the ultimate success of the Vietnamization program. He also determined that, from a tactical point of view, combined American-South Vietnamese strikes at these sanctuaries had a very substantial likelihood of success. He therefore ordered them to be made.

The President's determination to authorize incursion into these Cambodian border areas is precisely the sort of tactical decision traditionally confided to the Commander-in-Chief in the conduct of armed conflict. From the time of the drafting of the Constitution it has been clear that the Commander-in-Chief has authority to take prompt action to protect American lives in situations involving hostilities. Faced with a substantial troop commitment to such hostilities made by the previous Chief Executive, and approved by successive Congresses, President Nixon had an obligation as Commander-in-Chief of the country's armed forces to take what steps he deemed necessary to assure their safety in the field. A decision to cross the Cambodian border, with what must for practical purposes be viewed as the tacit consent of the Cambodian government, in order to destroy sanctuaries being utilized by North Vietnamese in violation of Cambodia's neutrality, is wholly consistent with that obligation. It is a decision made during the course of an armed conflict already commenced as to how that conflict shall be conducted, rather than a determination that some new and previously unauthorized military venture shall be taken.

By crossing the Cambodian border to attack sanctuaries used by the enemy, the United States has in no sense gone to "war" with Cambodia. United States forces are fighting with or in support of Cambodian troops, and not against them. Whatever protest may have been uttered by the Cambodian government was obviously the most perfunctory, formal sort of declaration. The Cambodian incursion has not resulted in a previously uncommitted nation joining the ranks of our enemies, but instead has enabled us to more effectively deter aggression heretofore conducted from the Cambodian sanctuaries by those already in arms against us.

The Vietnamese hostilities were jointly authorized by the two branches of government between which the powers of the Constitution divided the "war power." Placed in its proper perspective, the Cambodian incursion is a phase of these hostilities, and not the commencement of new hostilities. This being the case, the President's authority to do what he did, in my view, must be conceded by even those who read Executive authority narrowly.

PRESIDENTIAL WAR-MAKING: CONSTITUTIONAL PREROGATIVE OR USURPATION?

*W. Taylor Reveley III**

AMONG the principal rites of an unpopular war is the inquisition: the investigation of those men and institutions responsible for the decision to fight. Often the inquisition seeks only scapegoats.¹ But occasionally it is less concerned with fixing blame than with avoiding future evil. Much of the current inquiry into the scope of the President's constitutional authority to commit American troops to foreign conflict partakes more of the redemptive than the punitive.² Reasoned consideration of the question, however, is difficult for at least three reasons. The problem is many-faceted; the relevant context, in both its precedential and policy elements, unusually rich; and passions on the matter notably high. Thus, there is danger of a simplistic analysis based upon only a few of the pertinent factors, supported by selected bits of precedent and policy, and given direction by a visceral reaction to Vietnam. Karl Llewellyn's injunction that the reader should till an author "for his wheat, sorting out his chaff"³ is singularly appropriate regarding treatments of this aspect of presidential power. What follows is an attempt to delineate the bounds of the problem—an attempt undertaken with an awareness of the inherent opportunities for error.

* Virginia Law Review, November 1969, pp. 1243-1305.

¹ Some of the present assaults on the military seem to be in this vein. See, e.g., Finney, *Questions over Military: Bombardment on What It Is Doing and Why*, N.Y. Times, May 25, 1969, § 4, at 1, cols. 2-6; *The Military-Industrial Complex*, NEWSWEEK, June 9, 1969, at 74-87. See generally *Military: Servant or Master of Policy*, TIME, April 11, 1969, at 20-26.

² Among the better treatments of the question are F. WORMUTH, *THE VIETNAM WAR: THE PRESIDENT VERSUS THE CONSTITUTION* (April 1968) (Occasional Paper: Center for the Study of Democratic Institutions) [hereinafter cited as WORMUTH]; Kurland, *The Impotence of Reticence*, 1968 DUKE L.J. 619; Moore, *The National Executive and the Use of the Armed Forces Abroad*, 21 NAVAL WAR COLLEGE REV. 28 (Jan. 1969); Schwartz & McCormack, *The Justiciability of Legal Objections to the American Military Effort in Vietnam*, 46 TEXAS L. REV. 1033 (1968); Velvel, *The War in Viet Nam: Unconstitutional, Justiciable, and Jurisdictionally Attackable*, 16 KAN. L. REV. 449 (1968); *President's War Powers—I & II*, C.Q. GUIDE TO CURRENT AM. GOV'T 63, 67 (Spring 1968); Note, *Congress, the President and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968).

³ K. LLEWELLYN, *THE BRAMBLE BUSH* 10 (1960).

POLITICAL OR JUDICIAL RESOLUTION OF THE ISSUE?

In theory, both the judicial and the political processes are available to set the limits on presidential use of force abroad. As a rule, the judicial and political processes differ notably in their mode of decision-making. Courts generally reach the result dictated, or at least suggested, by pre-existing law. Thus, judges emphasize precedent over policy and strive for an impartial decision, rather than for one that recognizes the relative power of the interests concerned. Political interaction, on the other hand, usually alters the legal status quo to meet the changing needs and demands of the community. Thus, policy is emphasized over precedent, and the decision is shaped by the relative power of the participants.

These distinctions, however, lose much of their force in the context of constitutional limits on presidential power. Unlike cases involving statutory or even common law, constitutional questions leave courts far freer to make basic community decisions, not only because the judiciary is free of any actual or potential legislative ukase but also because it is interpreting an unusually ambiguous and evolutionary document.⁴ In the sensitive area of presidential power, the judiciary's instinct for self-preservation and its desire to hand down effective judgments necessitate that some account be taken of the relative strength of the opposing interests. The contextual features which increase the judiciary's room for maneuver have the converse effect upon the political decision-maker. His ability to alter the legal status quo is reduced when the norms in question are of constitutional stature. Thus, he must give far more attention to existing doctrine than usual, and he is pushed close to the role of the impartial applier of the law.

Though it is important to recognize that the judicial and political processes would not be dissimilar in their approach to the limits on presidential use of force abroad, significant differences remain. A judicial resolution would be more focused and clear-cut than a political one, but also more inflexible. It would be more concerned with the dictates of doctrine and less with the balance of power, and it would run a greater risk of being ignored or subverted than a political decision.⁵ While judicial involvement in the question at hand has been vigorously urged,⁶ the immediate prospect of such involvement is dim.⁷ Accord-

⁴ See text at notes 22-23 *infra*.

⁵ See note 104 *infra*.

⁶ See, e.g., Schwartz, *supra* note 2; Velvel, *supra* note 2, at 479-503(e). But see Moore, *supra* note 2, at 35-36; Note, 81 HARV. L. REV., *supra* note 2, at 1794.

ingly, to the extent that the issue is resolved, its resolution will come through the interaction of the President, Congress and the electorate—a method often used to settle fundamental constitutional questions.⁸

THE ISSUE MORE FULLY DEFINED

The issue is best framed in terms of the constitutional limits on presidential power to pursue a foreign policy which may easily lead to armed conflict, rather than simply in terms of executive power to commit troops to foreign combat.⁹ Resort to arms is rarely the first step in

⁷ Though given ample opportunity to resolve the constitutionality of American participation in the Vietnam War, federal courts have consistently declined to consider the matter, primarily because they view it as a political question. See, e.g., *Mora v. McNamara*, 387 F.2d 862 (D.C. Cir.), *cert. denied*, 389 U.S. 934 (1967); *Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967); *United States v. Mitchell*, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967); *Velvel v. Johnson*, 287 F. Supp. 846 (D. Kan. 1968); Schwartz, *supra* note 2, at 1051 n.61.

⁸ See G. SCHUBERT, JR., *THE PRESIDENCY IN THE COURTS* 347-48 (1957).

⁹ It is well to note in passing the existence of a second level of legal restraints. Under international law, the United States, and possibly the President as an individual, are forbidden to use military force unilaterally except in self-defense, and are enjoined, whenever arms are employed, to follow the laws of war. The primary international stricture against the use of force by states to resolve their disputes is U.N. CHARTER art. 2, para. 4: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations." Article 2(4), however, is subject to the proviso stated in article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." As there is no general consensus on the precise scope of the article 51 exception, the ban in article 2(4) on the use of force has proved less expansive than might have been expected.

The laws of warfare have been codified in several multilateral treaties, especially the Hague Conventions of 1907, e.g., Peaceful Settlement of Disputes, Oct. 18, 1907, 36 Stat. 2199, T.S. No. 536; Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539; Naval War, Oct. 18, 1907, 36 Stat. 2396, T.S. No. 544; and the Geneva Prisoner of War Convention, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364.

The potential liability of the President, should he be guilty of waging an illegal war under international law, or of conducting in an illegal manner a struggle otherwise justified, stems from the precedent set by the Nuremberg and Tokyo War Crimes proceedings, in which individuals were held responsible for their participation in military operations deemed beyond the law. The tribunals' actions were affirmed unanimously by the United Nations General Assembly in its 1946 adoption of the principles of the Nuremberg Charter, G.A. Res. 95, U.N. Doc. A /64/ Add. 1, at 188 (1946). Barring the conquest of the United States, the President runs no risk of actual trial for violation of the Nuremberg principles, but they are likely to affect his conduct. Were he widely believed to be a war criminal, his political effectiveness would plummet,

the conduct of any American foreign policy. Armed force is generally used only *in extremis* to salvage a policy which more pacific modalities could not preserve and advance. Thus, the decision to use the military is usually taken under circumstances which make its dispatch hard to resist; pressures for commitment, both domestic and foreign, will exist which could have been avoided or mitigated had a different foreign policy been pursued.¹⁰ Though there is not a one-for-one correlation, it is generally true that to limit presidential war-making, it is first necessary to limit presidential policy-making.¹¹

both at home and abroad. And, perhaps more fundamentally, his own personal commitment to the law usually dictates adherence to these principles, at least as he understands them. See Falk, *International Law and the United States Role in Viet Nam: A Response to Professor Moore*, 76 YALE L.J. 1095, 1100-01 n.12 (1967); Schwartz, *supra* note 2, at 1033-35.

Arguably these international provisions bear on domestic constitutional law. At one extreme, the possibility exists that presidential war-making in violation of international law is *per se* unconstitutional. See Falk, *International Law and the United States Role in the Viet Nam War*, 75 YALE L.J. 1122, 1155 (1966). But see Falk, *International Law and the United States Role in Viet Nam: A Response to Professor Moore*, 76 YALE L.J. 1095, 1150-51 (1967). A middle reading of the relationship would place a breach of international law among the factors suggesting unconstitutionality. At the other pole is an analysis which finds no necessary link between domestic and international law. The prevailing American authority supports the second extreme, holding that the constitutionality of presidential use of force abroad is strictly a matter for domestic law. See Moore, *International Law and the United States Role in Viet Nam: A Reply*, 76 YALE L.J. 1051, 1092-93 (1967). Thus, a war illegal under international doctrine may nonetheless be quite constitutional.

¹⁰ To remain in power, a President and his congressional supporters can ill afford to admit that they have fruitlessly pursued a costly foreign policy. Thus, once objectives are proclaimed and sought, their realization becomes important for the political survival of their proponents, irrespective of whether the goals in question have continuing merit. Similarly, to maintain the credibility of American commitments to contain communism, it has been felt essential to honor pledges to support other noncommunist governments, regardless of the inherent importance of the country being assisted. With reference to John F. Kennedy's decision to deepen American involvement in Vietnam, it has been authoritatively stated that

he believed that a weakening in our basic resolve to help in Southeast Asia would tend to encourage separate Soviet pressures in other areas. . . .

[T]his concern specifically related to Khrushchev's aggressive designs on Berlin President Kennedy clearly did believe that failure to keep the high degree of commitment we had in Viet-Nam . . . had a bearing on the validity of our commitments elsewhere.

Bundy, *The Path to Viet-Nam: A Lesson in Involvement*, 57 DEP'T STATE BULL. 275, 280 (1967). See note 20 *infra*.

¹¹ Recognition of the relationship between the President's control of foreign policy and his capacity to use the military abroad is not a recent phenomenon. It was clearly noted by Charles A. Beard, writing of times far more placid than the present:

[The President] may do many things that vitally affect the foreign relations of the country. He may dismiss an ambassador or public minister of a foreign

Presidential war-making, as an actuality or feared potentiality, has been an issue throughout our history. The controversy has been fueled by the unpopularity of most of our wars,¹² by a deep-rooted fear with us since the framing of the Constitution that the President is grasping to himself all decision-making power,¹³ and by the nature of the Constitution itself. The document is notably vague concerning the allocation of authority between the President and Congress over American foreign relations. Each is granted a line of powers which, in isolation, could support a claim to final authority. Edward S. Corwin has spoken of these grants as "logical incompatibles" and indicated, in words now hallowed and hackneyed by frequent invocation, that "the

power for political as well as personal reasons, and, if on the former ground, he might embroil the country in war. His power to receive any foreign representative authorizes him to recognize the independence of a new state, perhaps in rebellion against its former legitimate sovereign, and thus he might incur the risk of war [for example, Mr. Roosevelt's recognition of the republic of Panama in revolt against Columbia]. He may order a fleet or ship to a foreign port under circumstances that may provoke serious difficulty; the ill-fated battleship Maine was sent to the harbor of Havana by President McKinley at a time when it was regarded by many Spaniards, though not officially, as an unfriendly act. . . . As commander-in-chief of the army he might move troops to such a position on the borders of a neighboring state as to bring about an armed conflict. A notable instance of such an action occurred in the case of the opening of the Mexican War, when President Polk ordered out troops into the disputed territory, and, on their being attacked by the Mexicans, declared that war existed by act of Mexico. Again, in his message to Congress the President may outline a foreign policy so hostile to another nation as to precipitate diplomatic difficulties, if not more serious results. This occurred in the case of the Venezuelan controversy, when President Cleveland recommended to Congress demands which Great Britain could hardly regard as anything but unfriendly.

C. BEARD, *AMERICAN GOVERNMENT AND POLITICS 196-97* (3d ed. 1920) (footnote omitted); *accord*, Morgenthau, *The American Tradition in Foreign Policy*, in *FOREIGN POLICY IN WORLD POLITICS* 246 (3d ed. 1967 R. Macridis). The Morgenthau theory is even more expansive than Beard's: "[The Executive] can narrow the freedom of choice which constitutionally lies with Congress to such an extent as to eliminate it for all practical purposes." *Id.* at 264.

¹² With the exception of the two World Wars, all substantial military efforts of the United States have been bitterly condemned by various elements of the population. See Fleming, *Other Days—Other Vietnams*, *THIS WEEK*, Dec. 31, 1967, at 4-7.

¹³ Arthur Schlesinger has noted:

There has been nothing more continuous throughout American history than commentary on the supposed tendency of the presidency to absorb all the powers of the American system. The theory . . . of the President as the great moloch generating its own divinity and about to swallow all power can be reproduced at every stage in our history, beginning with those who . . . complained against the presidency of General Washington.

A. SCHLESINGER, JR. & A. DE GRAZIA, *CONGRESS AND THE PRESIDENCY: THEIR ROLE IN MODERN TIMES* 91 (1967); see M. CUNLIFFE & EDITORS OF *AMERICAN HERITAGE*, *THE AMERICAN HERITAGE HISTORY OF THE PRESIDENCY* 170-83 (1968).

Constitution, considered only for its affirmative grants of powers capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy.”¹⁴ Beyond its complementary grants of powers, the Constitution encourages confusion and struggle by the highly abstract terms in which it states many important powers. “The Congress shall have Power . . . [t]o declare War”¹⁵ and “[t]he executive Power shall be vested in a President of the United States of America,”¹⁶ for example, leave much to further definition. Finally, the document, partly because of its complementary and abstract nature, frequently fails to indicate where the ultimate authority lies on many questions, such as the peacetime stationing of American troops abroad.

Although the scope of presidential power to involve the country in war is not a new issue, it has become a matter of increasing importance since 1945. With the exception of two World Wars and the Cold War, armed force has generally played a very insignificant role in American diplomacy outside the Western Hemisphere. Even during the years immediately following Independence, when American security was believed to depend largely on the policies of European powers, no effort was made to influence those policies by the dispatch of United States forces to participate in European conflicts. Until the twentieth century, three factors in particular—geography, the state of military technology and a viable European balance of power—enabled the United States to regard foreign relations very casually.¹⁷ American security

¹⁴ E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957*, at 171 (4th rev. ed. 1957). The fact that complementary powers were granted the President and Congress was not overlooked by the Framers. “Madison emphasized at some length in 1796 that ‘if taken literally, and without limit’ these passages from the Constitution ‘must necessarily clash with each other,’” and that “there are no ‘separate orbits’ in which the various powers can move and no ‘separate objects’ on which they can operate without ‘interfering with or touching each other.’” M. McDUGAL & ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* 451, 453 (1960); see A. SCHLESINGER, *supra* note 13, at 1-5, 19-20.

¹⁵ U.S. CONST. art. I, § 8.

¹⁶ *Id.* art. II, § 1.

¹⁷ Woodrow Wilson’s full awakening, though it preceded that of most of his countrymen, took place only after he assumed the presidency. A passage from A. LINK, *WILSON THE DIPLOMATIST* (1957), captures the lack of concern with foreign affairs typical of late nineteenth century America:

In his first book, *Congressional Government*, an inquiry into the practical functioning of the federal government published in 1885, Wilson made only a passing reference to foreign affairs, and that in connection with the Senate’s treaty-making power. Four years later Wilson published *The State*, an excellent pioneer text in comparative government. Out of a total of more than one hundred pages devoted to the development of law and legal institutions, he gave a page and a half to international law. In his analysis of the administrative

was not deemed to depend upon that of distant states; there were no wide-ranging defense commitments. Moreover, even had a President desired to use armed force abroad on more than a piddling scale, he would have been pressed to muster sufficient troops. For much of their history, the Army and Navy could aptly be described as "tiny, obscure bodies,"¹⁸ with no draft laws in existence to swell their ranks and no federal income tax available to fund a large military establishment.

Under these circumstances, the armed efforts which were made tended to be modest in their use of men and resources; they were rarely directed against other established states; few were regarded as vital to our national defense; and thus most could have been easily abandoned or repudiated. Even if Presidents had believed that American interests required extensive use of force abroad, and had they possessed the capacity to act on their beliefs, the resulting danger would have had finite limits. Geography, military technology and the prevailing balance of power would have kept the ensuing conflicts within survivable bounds.

Conditions today, however, are radically different. The revolution in military technology has ended our geographic immunity,¹⁹ leading,

structures of modern governments, he described the machinery of the foreign relations of the British Empire in five words, but devoted twenty-six pages to local government in England; and he gave thirteen times as much space to the work of the Interior Department as to the Department of State in the American government. Finally, in his summary chapters on the functions and objects of government, he put foreign relations at the bottom of his list of what he called the "constituent functions" and then went on to elaborate the functions and objects of government without even mentioning the conduct of external affairs!

Id. at 5-6 (footnotes omitted).

Wilson began to show more interest in foreign affairs during the 1890's and early 1900's, concluding that the war with Spain had once again raised foreign questions to the fore in American politics, as well as greatly enhanced the power of the President. *Id.* at 6-9. Yet, ironically, he still failed to give serious attention to world developments prior to coming to the White House. Link concludes that "Wilson did not concern himself seriously with affairs abroad during the period from 1901 to 1913 both because he was not interested and because he did not think that they were important enough to warrant any diversion from the mainstream of his thought." *Id.* at 11.

¹⁸ AMERICAN HERITAGE, *supra* note 13, at 190. In 1789 American armed forces on active duty totaled 718 men. By 1812 they had grown to over 12,000 but, with the exception of the Civil War years, never significantly exceeded 50,000 until their sudden increase to 200,000 during the Spanish-American War. After World War I, their number ranged between 250,000 and 300,000 for twenty years. Since 1950, however, there have been approximately 3,000,000 men under arms at all times. Note, 81 HARV. L. REV., *supra* note 2, at 1791 n.106. To conduct the Vietnam War, the number has swelled to almost 3,500,000. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 255 (90th ed. 1969).

¹⁹ The interdependence of Americans with other peoples is not due merely to ad-

first, to a belief that American security is intimately tied to that of many other countries and, second, to pledges that we will defend other nations.²⁰ Evolution in the balance of world power has left the United States as one of the two great superstates in a bipolar system which abhors the shift of territory from one bloc to another. And the revolution in American military capacity has provided the President with a potent, flexible means of intervention abroad on a moment's notice—a capacity which cold war Presidents have used freely in attempting to prevent a loss of territory to communism. Such initiation of force, even when clearly authorized by the Executive alone, was broadly supported until Vietnam, on the assumption that dissent might undermine American security.²¹ Furthermore, the existence of nuclear weapons permits no assurance that all conflicts will remain within survivable limits. In sum, there has been reason for each cold war President to feel compelled to use force abroad, few restraints on his ability to act quickly and unilaterally, and strong popular feeling that his actions—whatever their nature—must be supported, although there has been little certainty about their ultimate consequences. Under these circumstances, the scope of presidential power to commit troops abroad becomes a matter of great import—far greater than ever before.

THE RELATIONSHIP OF THE CONSTITUTION TO THE ISSUE

What possible relevance can the Constitution, a product of the late

vances in military technology and concern for our security. Revolutionary advances in the exchange of ideas, information, goods and services have left no realistic alternative to participation in global affairs. See McDougal, Lasswell & Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188, 189-94 (1968).

²⁰ At present the United States has defense agreements with 48 foreign countries, and maintains approximately 400 major military installations abroad, stationing approximately 900,000 troops in foreign fields, other than Viet Nam. *TIME*, April 11, 1969, at 26. To maintain the credibility of commitments to defend such vital areas as Western Europe, with nuclear weapons if necessary, Washington has often felt compelled to protect friendly regimes in nations of little intrinsic significance. Fear has also existed that the loss of one such state could easily lead to the general collapse of others similarly situated. See, e.g., Bundy, *supra* note 10, at 280-81.

²¹ Once the President has committed troops to combat, he can generally rally support even from those opposed to his policies, by demanding that they back the boys in the field—or presumably face political oblivion. As President Johnson delicately suggested in his message to Congress of May 4, 1965, requesting additional appropriations for Vietnam: "To deny and to delay this means to deny and delay the fullest support of the American people and the American Congress to those brave men who are risking their lives for freedom in Vietnam." 111 CONG. REC. 9284 (1965); see C. ROSSITER, *THE AMERICAN PRESIDENCY* 51-52 (2d ed. 1960).

eighteenth century, have to an issue whose dimensions have changed radically even within the last twenty-five years? It seems that there are at least two major misapprehensions about the document. At one extreme is the assumption that it provides a wholly ascertainable, eternal set of dictates. Proponents of this position find much plain meaning in the constitutional language and read any ambiguous or incomplete provisions in light of the intent of the Framers.²² To depart from this intent, formal amendment is deemed necessary. Adherents of strict construction also tend to assume that once the rules—that which is written in the document—are known, the whole of constitutional law has been grasped.

At the other extreme is the assumption that the document is simply a hollow shell, given content by the practice of the moment. Proponents of this position find virtually no plain meaning in the relevant provisions, and, even when meaning appears, give it little or no weight if contemporary practice is contrary. The intent of the Framers fares no better. Thus, the mere existence of current practice is proof of its constitutionality. Adherents of this view tend to assume that once the actual practice of the moment—the basic power machinations—are known, the whole of constitutional law has been grasped.

The problems with the position of the strict constructionists will be examined first. Plain meaning is an illusory goal in the interpretation of a document, such as the Constitution, which governs the continuing conduct of an immensely complex process in language notable for its abstraction, complementarity and frequent failure to speak to vital issues. Such a document must receive much of its meaning from sources other than its wording. Moreover, since it was designed to remain perpetually viable, the intent of the Framers, when available, binds subsequent interpreters far less than does the intent of the drafters of the typical contract or statute.

In determining the meaning of any constitutional provision, the ultimate criterion must be the long-term best interests of the country. If the Constitution is to remain functional, its interpretation has to move

²² [T]he mechanical, filipietistic theory, purports to regard the words of the Constitution as timeless absolutes. The sole problem of an interpreter . . . is to find what meaning the words had in terms of the idiosyncratic purposes of the Framers in the light of the conditions and events of their day. It is assumed that this meaning can be discovered and can and must be applied without loss or change, to the problems of the present day, by completely different people under completely different conditions.

M. McDUGAL, *supra* note 14, at 444 (footnote omitted).

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in pace with our changing needs and values.²³ Encouraged by the Constitution's linguistic flexibility, and by the difficulty of its formal amendment process,²⁴ alteration by usage has proved to be the principal means of modifying our fundamental law.²⁵ The constitutional provisions governing the conduct of foreign affairs have been duly affected by this evolutionary²⁶ process.

Strict constructionists thus fail to recognize the extent to which the document's language must be supplemented before it becomes meaningful; they do not realize that the supplementation must ultimately

²³ [I]t is utterly fantastic to suppose that a document framed 150 years ago "to start a governmental experiment for an agricultural, sectional, seaboard folk of some three millions" could be interpreted today . . . in terms of the "true meaning" of its original Framers for the purpose of controlling the "government of a nation, a hundred and thirty millions strong, whose population and advanced industrial civilization have spread across a continent." Each generation of citizens must in a very real sense interpret the words of the Framers to create its own constitution. The more conscious the interpreters are that this is what they are doing the more likely it is that their interpretations will embody the best long-term interests of the nation. In truth, our very survival as a nation has been made possible only because the ultimate interpreters of the Constitution—presidents and congressional leaders, as well as judges—have repeatedly transcended the restrictive interpretations of their predecessors.

Id. at 446-47 (footnotes omitted).

²⁴ McDougal suggests that the American people in their frequent alteration of the Constitution by informal adaptation

have also been motivated by a wise realization of the inevitable transiency of political arrangements. The ultimate advantage of usage over formal textual alteration as a method of constitutional change is that, while it preserves the formal symmetry of the document, it reduces the danger of freezing the structures of government within the mold dictated by the expediencies or political philosophy of any given era. A formal amendment may be outmoded shortly after it is adopted, but usage permits continual adjustment to the necessities of national existence.

Id. at 545.

In constitutions in which the language is more detailed and its formal amendment less difficult, change by usage is the exception. See Note, *State Constitutional Change: The Constitutional Convention*, 54 VA. L. REV. 995, 998-1000 (1968).

²⁵ In innumerable respects, the division of functions between the different branches of the government and the scope of federal authority, as clearly contemplated by the Framers, have been altered by usage and prescription, without resort to formal textual amendment. "For every time that the Constitution has been amended," as Justice Byrnes has pointed out, "it has been changed ten times by custom or by judicial construction." This process of constitutional evolution has by no means been restricted to the numerous phases of government which the draftsmen deliberately left ambiguous or unsettled; in many instances the very words and phrases of the written Constitution have been given operational meanings remote from the intentions of their original penmen.

M. McDougal, *supra* note 14, at 542 (footnotes omitted). For numerous instances of alteration by usage, see *id.* at 442-75, 540-60.

²⁶ For a summary of some of the more important changes, such as the end of the Senate's role as a coordinate director of treaty negotiations and preemption by the President of the power of recognition, see *id.* at 557-60.

be in terms of the best interests of the country and not simply in the lock-step of the Framers' intent; and they will not accept that upon occasion even the clear intent of the Drafters must be abandoned without the process of formal amendment, if the Constitution is to minister successfully to needs created by changing times. Their rigidity leads as well to one final misapprehension: that to know the rule is necessarily to know the law. An understanding of what is written in the Constitution, even assuming a viable interpretation of the language, simply provides information regarding peoples' expectations about the type of conduct that is constitutional. If acts forbidden by a reasonable reading of the rules continue to be performed, it is highly unrealistic to regard the rules as complete statements of the law. To constitute "the law" the course of conduct dictated by the rules must be the one followed in actual practice.²⁷

Strict constructionists are equalled in their error by those at the opposite pole who automatically bestow the mantle of constitutionality on whatever happens to be the practice of the moment. Although the document must receive much of its meaning from sources other than its language and its interpretation must evolve to meet the differing needs of differing times, it is not simply a hollow shell whose principles are ever in flux. The goal of constitutional interpretation, as indicated, should be a reading that serves the long-term best interests of the country. In realizing that goal, serious attention should be paid the intent of the Framers for at least two basic reasons. First, the Founding Fathers may have ordained a practice which still has validity. If their design is workable, it should be respected, particularly when the constitu-

²⁷ In any particular community it is possible to observe among its constituent social processes a process of effective power, *i.e.*, decisions of community-wide impact are in fact made and put into controlling effect. . . . [T]hese effective power decisions . . . [are] of two different kinds. Some . . . are taken from simple expediency, or sheer naked power, and enforced by severe deprivation or high indulgences, whether the community members like them or not. Other decisions, however, are taken in accordance with community expectations about how such decisions should be taken: they are taken by established decision-makers, in recognized structures of authority, related to community expectations of common interest, and supported by enough effective power to be put into effect in consequential degree.

It is these latter decisions, those taken in accordance with community expectations and enforced by organized community coercion, which are . . . most appropriately called "law." In this conception law is, thus, a process of decision in which authority and control are conjoined. Without authority, decision is but arbitrary coercion, naked power; without control, it is often illusion. McDougal, *Jurisprudence for a Free Society*, 1 GA. L. REV. 1, 4 (1966); *accord*, Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662, 666 (1968).

tional language, read in light of the intent of the Drafters, seems to be clear. A better way of doing the job might be devised, but the design of the Framers should be honored lest its disregard undermine public confidence in the rule of law. The general public tends to take a strict view when confronted with clear language and intent,²⁸ unless they feel that the applicable provision is blatantly detrimental to their interests.

Accordingly, when conspicuous government officials disobey or appear to disobey the rules in their conduct of public affairs, the general public's respect for prevailing norms suffers.²⁹ The government, one of whose major objectives must be the creation and maintenance of a rule of law, simply cannot ignore or seem to ignore the norms applicable to its proceedings without undermining the entire system. Thus, if it appears that the President is flouting the Constitution in his use of American troops abroad, an effect on lesser mortals will be unavoidable.³⁰ If the document seems to be irrelevant to him, more

²⁸ Direct support for this proposition would be comforting, since it figures in this Article's subsequent analysis. Unfortunately, the only authority offered here is personal opinion. It seems that most people feel that the rule of law necessitates undeviating adherence to the intent of the law-giver, until the language in which he embodied his intent is physically changed in accordance with formal processes of revision. Nothing less will suffice to assure these people that our society is governed according to law, and not pursuant to the whim of public officials. Thus, pending formal amendment of the language of the Framers, most people believe that their intent ought to remain binding. Cf. P. MISHKIN & C. MORRIS, *ON LAW IN COURTS* 78-81, 258-67 (1965) (the crisis of confidence engendered by judicial overruling of well-established doctrines).

²⁹ Since it would be virtually impossible to obtain the requisite level of obedience by coercion, the stability of our legal system depends largely upon voluntary obedience to the law. Thus, most people do not base their acceptance of laws primarily on fear that disobedience will result in apprehension and punishment. See H. HART, *THE CONCEPT OF LAW* 79-88 (1961). On the contrary, public support for the legal system is motivated by a variety of other factors—habit, desire to conform, belief that a given law embodies a moral command or that it serves individual self-interest, awareness that the legal system depends on acceptance of its norms, and assurance that other people and institutions are obeying the rules applicable to them. Should it appear that some elements of society disregard the law, then the willingness of their fellows to honor norms they find to be inconvenient or ill-advised will be notably lessened.

³⁰ Edward H. Levi recently noted:

Our most pressing failure relates to our attitude toward the legal system. Civil disobedience and indifference to law have become sufficiently widespread to reflect and raise essentially naive questions as to the function of law in a modern society. It is paradoxical that the civil rights movement which in the almost immediate past built upon law, and depended so much on the morality of acquiescence, should now, to some extent, be the vehicle for the destruction of this acquiescence. *The undeclared Viet Nam war has further emphasized the morality of illegal acts*

Levi, *Unrest and the Universities*, U. CHI. MAGAZINE, Jan./Feb. 1969, at 25 (emphasis added).

humble rules will be regarded with equal disdain by many of his fellow citizens.³¹

Thus, absent necessity to abandon old constitutional patterns, the contemporary interpreter would do better to follow them, reshaping and extending them to meet the needs of the times.³² Though the Framers may not have conceived of the conditions to which one of their provisions now applies, if its underlying principle remains tenable, the principle should be carefully and skillfully preserved. For example, if it seems clear that the Framers intended Congress to have a meaningful voice in decisions regarding the use of American troops abroad, then every effort should be made to give life to that guiding principle, using procedures attuned to contemporary needs.³³

Those who view the Constitution as a hollow shell, accordingly, overlook the framework which the document does frequently provide, and they fail to accord its language and the Framers' intent the weight they are due if the long-term best interests of the country are to be served. The Shellists' emphasis on the practice of the moment also leads them to a final misapprehension: that to know what is actually done is necessarily to know the law. Practice, unless it is in accord with the rules, is simply the exercise of naked power, not law.

Americans have traditionally been concerned with constitutional rules. They want governmental power to be exercised in the prescribed manner. Much of the controversy surrounding the Vietnam War concerns not simply the merits of the conflict but also the constitutionality of the United States involvement. When practice is deemed to fall outside the rules, efforts will be made to bring it back within. Accordingly, immediate past precedent may or may not be upheld; its existence is not conclusive of its legality.

In this regard, it is well to remember that most government officials—including the President—voluntarily try to stay within the bounds of the constitutional provisions applicable to them.³⁴ Peoples' expectations

³¹ The President could, of course, argue that he is attempting to amend the Constitution by usage, but the subtleties of such an argument would probably be lost on the general public. See note 28 *supra*.

³² Moreover, adherence to established constitutional patterns may often increase the actor's political power and prestige. See note 180 *infra*.

³³ Cf. L. FULLER, *THE MORALITY OF LAW* 84-85 (1964).

³⁴ See note 74 *infra* and accompanying text. A useful analogy can be drawn between presidential adherence to constitutional law in matters such as the use of force abroad and nations in their obedience to customary international law. As a rule, both appreciate the need to support the prevailing norms, and thus voluntarily accept them. Rarely would either, if accused of illegal activity, fail to deny the charge vociferously, adducing legal argument to justify the action. But since the precise demands of con-

regarding the nature of the rules strongly influence the type of action actually taken, just as practice, in turn, shapes expectations. Constitutional law, thus, is found where community understanding of the type of conduct required by the rules and what actually happens are largely synonymous.³⁵

One effective way to approach the constitutional question at hand is to study separately its practice and rule aspects, bringing them together after the features of each have been determined. Thus, an attempt needs to be made to learn the extent to which the President has unilaterally decided to commit American troops to foreign combat, irrespective of rule-based expectations regarding the constitutionality of his action. Once aware of what has in fact been the practice, there must be an attempt to determine what type of presidential conduct people have believed to be constitutional. If practice is then found to diverge significantly from the rules, the two courses must be reconciled in terms of the best interests of the country. Should practice be long-established and responsive to the needs of the times, the constitutional rules should evolve to meet it. Should practice, however, have needlessly and recently abandoned principles set out in the language of the document or evidenced by the Framers' intent, and embodied in continuing expectations, it should be altered to accord with the rules. A thorough examination of the nature just suggested would require several volumes.³⁶ For the purposes of this Article, it will suffice to trace

stitutional and international rules are often vague, and since there is little chance of clarification by judicial or legislative action (formal amendment in the case of the Constitution), both the President and nations have latitude in interpreting the relevant provisions. Each tends to define, fill in and alter the legal contours by a process of claim and concession. If presidential assertions of authority are acknowledged and acquiesced in by Congress, the electorate, and, should they choose to comment, the courts, the Executive assumes the power as his constitutional due. Even presidential claims rejected by one or more of these groups remain as potential sources of law, especially if the President has given them more than verbal substance. Nations proceed by a similar process of claim and concession. Finally, both the President and states are likely to ignore well-established rules when confronted with crisis. See M. Kaplan & N. Katzenbach, *Law in the International Community*, in 2 *THE STRATEGY OF WORLD ORDER* 34, 35-37 (R. Falk & S. Mendlovitz eds. 1966).

³⁵ See note 27 *supra* and accompanying text.

³⁶ All instances in which American troops were employed abroad would have to be examined to pinpoint the effective decision-makers. Expectations would have to be sought from a wide range of sources—"pre-1787 negotiations, subsequent practice by all branches of the government, statutory interpretations, judicial decisions and opinions, and the vast literature of expressions, formal and informal, about preferred public order." McDougal, *supra* note 27, at 18. And an intensive investigation would be required to identify the long-term best interests of the country and their policy implications.

briely the allocation of power between the Executive and Congress since 1789, considering both the factors contributing to the present high state of presidential control and the existing restraints upon it. One constitutional rule, the congressional power to declare war, will be treated in detail, while other relevant provisions will receive more cursory attention. Finally, an attempt will be made to view practice and rules together in light of the long-term best interests of the United States, outlining what seem to be the present constitutional limits upon the President.

THE BALANCE BETWEEN PRESIDENT AND CONGRESS: PRACTICE

Historical Background

At the risk of gross over-simplification, three historical stages may be identified in the President's progress toward virtually complete control over the commitment of American troops abroad. The first ran from independence until the end of the nineteenth century and was a time of genuine collaboration between the President and Congress, and of executive deference to legislative will regarding the initiation of foreign conflicts. Numerous figures are bruited about as representing the number of times during the course of American history that the President has unilaterally employed force abroad. One total frequently cited lists 125, the great bulk occurring in the nineteenth century.³⁷ Their existence, it is often said, establishes that presidential war-making is no twentieth century *parvenu*.³⁸

³⁷ SENATE COMM. ON FOREIGN RELATIONS, 82d CONG., 1ST SESS., POWERS OF THE PRESIDENT TO SEND ARMED FORCES OUTSIDE THE UNITED STATES (Comm. Print 1951). The report states in part: "Since the Constitution was adopted there have been at least 125 incidents in which the President, without congressional authorization, . . . has ordered the Armed Forces to take action or maintain positions abroad." *Id.* at 2. For a similar finding, see J. ROGERS, *WORLD POLICING AND THE CONSTITUTION* (1945), which describes 100 uses of American troops abroad between 1789 and 1945, and concludes that most of them were ordered unilaterally by the Executive. Since the publication of both these studies, there have been numerous additional instances of presidential use of force abroad, some of major impact.

³⁸ The State Department, in its defense of the Vietnam War, has stated:

Since the Constitution was adopted there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior congressional authorization, starting with the "undeclared war" with France (1798-1800). For example, President Truman ordered 250,000 troops to Korea during the Korean war of the early 1950's. President Eisenhower dispatched 14,000 troops to Lebanon in 1958.

The Constitution leaves to the President the judgment to determine whether the circumstances of a particular armed attack are so urgent and the potential

As precedent for Vietnam, however, the majority of the nineteenth century uses of force do not survive close scrutiny. Most were minor undertakings, designed to protect American citizens or property, or to revenge a slight to national honor, and most involved no combat, or even its likelihood, with the forces of another state.³⁹ To use force abroad on a notable scale, the President of necessity would have had to request Congress to augment the standing Army and Navy.⁴⁰ Executives of this era, in any event, were generally reluctant to undertake military efforts abroad without congressional approval. Accordingly, there are instances during this period of presidential refusals to act because Congress had not been consulted or because it had withheld approval, and there are many occasions of executive action pursuant to meaningful congressional authorization.⁴¹

Some of the instances grouped within the 125 presidential uses of force are erroneously included, chiefly the Naval War with France of 1798-1800 and the Barbary Wars of 1801-05 and 1815, which were

consequences so threatening to the security of the United States that he should act without formally consulting the Congress.

Meeker, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 DEP'T STATE BULL. 474, 484-85 (1966).

³⁹ For a description of the instances involved, see J. ROGERS, *supra* note 37, at 53, 56-67, 93-112; WORMUTH at 21-26. For a discussion of these events, see E. CORWIN, *TOTAL WAR AND THE CONSTITUTION* 144-50 (1947); R. LEOPOLD, *THE GROWTH OF AMERICAN FOREIGN POLICY* 96-98 (1962) [hereinafter cited as LEOPOLD]; Note, 81 HARV. L. REV., *supra* note 2, at 1787-89.

⁴⁰ The Executive's power to deploy American forces as their Commander-in-Chief posed few problems. During virtually all of the 19th century the President moved military units at will and without protest; in so doing, he rarely exposed himself to the charge of provoking another nation to fire the first shot. Through his secretary of the navy he assigned permanent cruising squadrons to the Mediterranean in 1815, the Pacific in 1821, the Caribbean in 1822, the South Atlantic in 1826, the Far East in 1835, and the African coast in 1842. The purpose of these squadrons was to show the flag, protect shipping, and encourage commerce. No contingents were regularly stationed on foreign soil, either to garrison an overseas base or to honor a diplomatic commitment.

LEOPOLD at 99. Presidential deployment of armed forces did, however, impinge upon congressional power to declare war in Polk's dispatch of General Taylor into territory claimed by Mexico and in McKinley's dispatch of the *Maine* to Havana. Moreover, usurpation was threatened in Grant's abortive attempt to annex Santo Domingo and in Harrison's 1891 dispatch of a cruiser to seize Chilean ships that had violated American neutrality laws. See *id.* at 99-102, 117.

⁴¹ See the instances cited in LEOPOLD at 97-98; WORMUTH at 6-20.

From 1836 to 1898, except for the administrations of Polk, Lincoln, and Cleveland, Capitol Hill tended to provide the initiative for the development of foreign policy. When, for example, the executive advocated expansionist policies—Pierce in Cuba, Seward in Alaska, Grant in Santo Domingo—he instantly encountered violent congressional opposition.

A. SCHLESINGER, *supra* note 13, at 24.

conducted with specific congressional approval.⁴² When presidential orders to American naval commanders exceeded the congressional mandate during the 1798-1800 hostilities, the Supreme Court in *Little v. Barreme*⁴³ ordered damages paid to the owner of a ship seized pursuant to executive instruction. It is unlikely, however, that President Adams was attempting by his conflicting orders to expand his war powers at the expense of Congress, since he had previously divested himself of his role as Commander-in-Chief and, with Senate approval, conferred it upon George Washington. President Thomas Jefferson was almost as self-effacing; before receiving congressional approval of the First Barbary War, he refused to permit American naval commanders to do more than disarm and release enemy ships guilty of attacks on United States vessels.

The era in question included three formally declared wars.⁴⁴ The decision to enter the War of 1812 was made by Congress after extended debate. Madison made no recommendation in favor of hostilities, though he did marshal a "telling case against England" in his message to Congress of June 1, 1812. The primary impetus to battle, however, seems to have come from a group of "War Hawks" in the legislature.⁴⁵ Similarly, McKinley was pushed into war with Spain in 1898 by con-

⁴² With respect to the Naval War: "President Adams took absolutely no independent action. Congress passed a series of acts which amounted, so the Supreme Court said, to a declaration of imperfect war; and Adams complied with these statutes." WORMUTH at 6; *accord*, LEOPOLD at 95. The acts were quite detailed regarding the nature of the hostilities authorized. See WORMUTH at 6-9; LEOPOLD at 95.

Though Jefferson unilaterally dispatched a naval squadron to the Mediterranean to protect American shipping from attack by Tripoli, he refused to permit offensive action until so authorized by Congress—much to Alexander Hamilton's outrage. See note 148 *infra*. Accordingly, an act was passed authorizing the President "fully to equip, officer, man and employ such of the armed vessels of the United States" as he found necessary to protect American commerce; to instruct the commanders of these ships to "subdue, seize, and make prize all vessels, goods, and effects, belonging to Bey of Tripoli, or to his subjects;" to commission privateers, and to take whatever "other acts of precaution or hostility as the state of war will justify." WORMUTH at 9-10; see LEOPOLD at 95-96.

When Algiers in 1815 attacked American shipping, President Madison obtained authorization to use force similar to that given in 1802 against Tripoli. WORMUTH at 10. Significantly, Congress refused the President's request for a formal declaration of war, granting him instead simply approval for limited hostilities. LEOPOLD at 96.

⁴³ 6 U.S. (2 Cranch) 169 (1804). See the discussion of *Little* in WORMUTH at 8-9.

⁴⁴ The greatest conflict of the period, the War Between the States, did not involve the use of force against foreign countries, though it gave rise to expectations about presidential power which have application in the foreign context. See notes 146, 158 *infra*.

⁴⁵ See LEOPOLD at 62-64, 94; A. SCHLESINGER, *supra* note 13, at 23.

gressional and popular fervor, though he himself inadvertently stoked their passion by sending the *Maine* to Havana. Full congressional authorization was given before the initiation of hostilities.⁴⁶ Congress was, on the other hand, presented with a presidential *fait accompli* in 1846. Polk provoked the Mexicans into a conflict which the legislators felt compelled to approve, particularly in light of the colored version of the facts presented by the President.⁴⁷ But within two years, the House of Representatives censured Polk for his part in the initiation of the conflict.⁴⁸

The second of the three stages mentioned previously began at the turn of the century and continued into World War II. Close collaboration between the Executive and Congress became the exception, as did presidential deference to congressional views on the use of force abroad. The legislators, nonetheless, remained a strong force in the shaping of foreign policies. Their influence, unfortunately, was often negative, obstructing the efforts of Presidents who saw a need to use American power to defend nascent security interests abroad. American military capacity had grown to the point, however, that the Executives had notable capacity for maneuver without prior congressional action.

During the first two decades of the twentieth century, Congress generally chose to watch quietly as the President unilaterally intervened in the Western Hemisphere, presumably because majority sentiment favored militant American hegemony over this area.⁴⁹ Presidents

⁴⁶ Congress first passed a joint resolution authorizing the President to use armed force if necessary to insure Cuban independence and Spanish withdrawal from the island and then followed with a formal declaration of war when Spain recalled its ambassador from Washington and showed no sign of leaving Cuba. See LEOPOLD at 117, 169-79.

⁴⁷ Until the last decade of the 19th century "[o]nly in the case of Texas and the Mexican War did the executive encroach upon the legislature's constitutional prerogative" by the manner in which he deployed American forces. LEOPOLD at 99. Leopold concludes that Polk "remains the sole president in history who, by needlessly deploying the armed forces, provoked an attack by a potential enemy." *Id.* at 101. But he also notes that virtually no protest was voiced in Congress during the first three months of General Taylor's advance into disputed territory and argues that "the silent acquiescence by the legislature destroys some of the complaint that the executive had usurped its war-making powers." *Id.*

⁴⁸ By an 85-81 vote the House ruled that the war had been "unnecessarily and unconstitutionally begun by the President of the United States." CONG. GLOBE, 30th Cong., 1st Sess. 95 (1848). See WORMUTH at 11.

⁴⁹ It was in November, 1903, in connection with the revolution in Panama, that a President of the United States first succeeded in exercising the war-making power without the consent of Congress. The purpose for which such power was

enjoyed similar freedom in the Far East⁶⁰ although they exercised it less robustly. The first wholly unauthorized executive war-making, nonetheless, took place in China during the Boxer Rebellion at the turn of the century.⁶¹

During most of the 1920's and 1930's American force abroad was used sparingly, in part because of a more relaxed approach to the difficulties of the Latin states and in part as a result of a strong popular desire to

exerted on this occasion was so popular a one that it was acquiesced in, with only slight objections, by both Congress and the public, and a most dangerous precedent for the future was thus created.

Putney, *Executive Assumption of the War Making Power*, 7 NAT'L UNIV. L. REV. 1, 34 (May 1927).

Roosevelt, in fact, would have preferred congressional involvement in his disregard of Columbian sensibilities, but events overtook him. See LEOPOLD at 231. Though Putney seems inaccurate in stating that Roosevelt's activities in Panama marked the first instance of unauthorized presidential war-making, see note 51 *infra* and accompanying text, it did signal the beginning of significant military intervention in Latin states, generally pursuant to unilateral presidential command. See H. CLINE, *THE UNITED STATES AND MEXICO* 155-62, 174-83 (rev. ed. 1965); LEOPOLD at 251, 316-21; Putney, *supra* at 33-41; Note, 81 HARV. L. REV., *supra* note 2, at 1789-90.

⁶⁰ Before the Spanish-American War the expansionist spirit had been confined mainly to navalists and their intellectual camp-followers. The conquest of the Philippines, however, opened the eyes of the American business man in the Far Eastern markets. With the acquisition of the Philippines our line of defense was thrust into the vicinity of China and Japan. Does this seem a strange lunge for a republic which vaunted its isolationism? If so, it can be explained by saying that our isolationist barricade had only one wall. We shut only our eastern door, for Americans marched out of their house in other directions. United States history is replete with exploits, successful and abortive, against the territories of our southern, western and northern neighbors. Isolationism accelerated rather than inhibited continental expansionism, for, in the beginning, we wanted to drive Europe out of North America. This impulse created a restlessness that drove Americans westward to San Francisco and in due course beyond the Golden Gate to Honolulu and Manila.

S. ADLER, *THE ISOLATIONIST IMPULSE: ITS TWENTIETH CENTURY REACTION* 19-20 (1957); accord, AMERICAN HERITAGE, *supra* note 13, at 282.

⁶¹ McKinley committed several thousand American troops to the international army which suppressed the Chinese nationalists and rescued western nationals trapped in Peking. The President was accused of usurping congressional power to declare war by a few democrats, but "since the legislature had adjourned before the crisis broke and since neither party desired a special session in an election year, these complaints produced no results." LEOPOLD at 117. For more detail, see *id.* at 215-18; J. ROGERS, *supra* note 37, at 58-62.

To an extent, McKinley is vulnerable to a charge of unilateral war-making in his suppression of the Aguinaldo-led attempt to win independence for the Philippines during the years 1899-1902. According to Rogers, *id.* at 112, 126,000 United States troops were employed in putting down the movement. The decision to insist that Spain surrender all of the Philippines to the United States was made by the President alone, and Senate approval of the treaty of peace with Spain did not constitute a clear endorsement of American control of the islands. For discussion, see LEOPOLD at 150-52, 180-88, 212.

avoid involvement in the struggles of the world's other great powers—the pristine American psyche had been gravely offended by the ta'en dry aftermath of World War I. The mood of the country showed itself vividly when Japanese bombers deliberately sent an American gunboat, the *Panay*, to the bottom of the Yangtze River on December 12, 1937. Quite unlike the popular reaction to attacks on the *Maine* and on destroyers in the Tonkin Gulf, the *Panay* incident gave immediate and tremendous impetus to a congressional attempt to amend the Constitution to subject war decisions to popular referendum, except in case of invasion.⁵³

Congressional devotion to neutrality and to nonintervention in the affairs of other states, especially those in Europe, made intelligent use of American influence difficult during and after the First World War. Wilson's troubles in bringing American power to bear against Germany, however, were minor compared to those experienced by Roosevelt under far more desperate circumstances.⁵⁴ Both Presidents, but especially Roosevelt, were forced to resort to deception and flagrant disregard of Congress in military deployment decisions because they were unable to rally congressional backing for action essential to national security.⁵⁵

⁵² Leopold states that Congress had few complaints about presidential use of force abroad during most of the interwar years. The placidity can be explained,

partly by the peace which the United States enjoyed during this interlude and partly by the modification of its protectorate policy in the Caribbean. The republic did not fight any wars, declared or undeclared, and there was a marked reduction in the sort of police action that had been frequent before 1921. Nor did the deployment of ships and men lead to congressional charges of presidential warmongering, as was the case after 1939. On one point the legislators continued to agitate. At every session, amendments to the Constitution were proposed to alter the war-making clauses. The most frequent were designed to halt profiteering, to bar using conscripts outside the continental United States, to require that a declaration of war pass each house by a three-fourths vote rather than a simple majority, and to hold a popular referendum, except in cases of invasion, before a congressional decision to go to war could take effect.

LEOPOLD at 416-17.

⁵³ See *id.* at 416-17, 534.

⁵⁴ The Neutrality Acts of 1935, 1936 and 1937 made no distinction between an aggressor and his victim; under the acts, Americans, especially the President, were to avoid any dealings which might involve the United States in another war. These laws, and the congressional and popular attitudes which they represented, placed a disastrous limitation on Roosevelt's attempt to use American power and influence to head off the impending crisis. See the accounts in S. ADLER, *supra* note 50, at 239-73; LEOPOLD at 504-09, 526-28, 531, 537-42, 557-65.

⁵⁵ Among his major unilateral steps, Roosevelt in 1940 exchanged fifty destroyers for British bases in the Western Atlantic; in 1941 he occupied Greenland and Iceland, ordered the Navy to convoy ships carrying lend-lease supplies to Britain, and on

The trauma of the Second World War and of the Cold War led to a third stage in which Congress—in penance for its policies during the twenties and thirties and fearful lest its interference harm national security⁵⁶—left direction of foreign affairs largely to the President, with the exception of a period of uproar during the early fifties.⁵⁷ As a rule, the legislators have presented no obstacles when the President wished to use force abroad, or to pursue policies likely to lead to its necessity. The Cold War has enjoyed bipartisan backing, both when the Executive acted wholly without congressional consent⁵⁸ and when he had authorization of sorts.⁵⁹ The decisions to employ arms off For-

September 11 of that year declared, in effect, that henceforth the United States would wage an air and sea war against the Axis in the Atlantic. See the accounts in E. CORWIN, *supra* note 39, at 22-34; LEOPOLD at 559-80; J. ROGERS, *supra* note 37, at 122-23.

After Germany's resumption of unrestricted submarine warfare, Woodrow Wilson in 1917 armed American merchantmen and instructed them to fire on sight. The President had sought congressional approval but had been thwarted by a Senate filibuster. He proceeded nonetheless, though he later admitted that his course was "practically certain" to lead to United States involvement in war. Message to Congress, Apr. 2, 1917. 55 CONG. REC. 102 (1917).

⁵⁶ One disquieting feature of the cold war was that perpetual crisis inhibited discussion. Criticism of the administration was apt to be interpreted as evidence of disloyalty; it was condemned as bringing aid and comfort to the enemy. The psychology of actual war—that of being either for or against one side—was applied to a situation that continued year after year.

AMERICAN HERITAGE, *supra* note 13, at 287.

⁵⁷ A "Great Debate" over Truman's authority to send troops to Korea and Western Europe raged for three months in early 1951, culminating in a Senate resolution calling for congressional authorization before the dispatch of further troops to fulfill NATO commitments. The attempt under Senator John Bricker's aegis to limit the scope of treaties and the use of executive agreements—to reassert a strong congressional influence in the shaping of foreign policy—came to naught in 1954, after Eisenhower made clear his unalterable opposition. See LEOPOLD at 660-61, 716-17. The hysteria bred by Senator Joseph McCarthy, playing upon frustrations and fears engendered by developments in China, Eastern Europe and Korea, came close to rendering Truman incapable of conducting an effective foreign policy during the latter years of his presidency.

⁵⁸ The Korean War, for example, was entered with no prior congressional authorization, and never received even *ex post facto* blessing, perhaps because it was not an unpopular conflict at its inception. LEOPOLD at 683, notes that Truman's initial commitment of naval and air forces was met with "some grumbling in the Senate about the war-making power," but that "[t]he House broke into applause on hearing the news." Senator Taft questioned the President's right to initiate the use of American forces without congressional approval, but, according to Leopold, "he blamed the method, not the move, and said he would have voted for armed intervention if that issue had been presented." *Id.*

⁵⁹ Eisenhower was authorized in January 1955 to use force if necessary to defend Formosa and its outlying islands, and in March 1957 to block communist aggression in the Middle East. A joint congressional resolution adopted in October 1962 authorized President Kennedy to use force if necessary to prevent the spread of communism from

mosa, in Korea, Lebanon, Cuba, the Dominican Republic and Vietnam were essentially the President's, as were the policies that led Washington to feel that force was essential.

Nonetheless, Congress has played an indispensable role in postwar foreign affairs. Without congressional willingness to back their policies, Presidents could have done little. Moreover, well aware that Congress could at any time hamstring their initiative by refusing requisite legislation or appropriations, Presidents have consistently conferred with congressional leaders when shaping policy and have sought their advice—or at least informed them before the fact—when deciding to employ force abroad. The point, however, is that despite its latent power, Congress has had little part in shaping American foreign policy over the last quarter century, particularly where questions of the use of force are concerned. Foreign aid may have been subjected to an annual blood-letting but not the President's capacity to commit and maintain troops abroad.

It is possible that a fourth stage is now developing in public and congressional restiveness over Vietnam. Whether a new era will come to fruition or die with the end of the present conflict remains to be

Cuba or the development there of an externally supported military capability dangerous to the security of the United States. And President Johnson received in August 1964 a joint resolution providing in part that "the United States is . . . prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom." Vietnam Joint Resolution, 78 Stat. 384 (1964).

When force was used in Lebanon, in the Atlantic off Cuba during the Missile Crisis and in Vietnam, however, it was unclear to what extent the respective Executives based their action upon prior congressional approval and to what extent upon claims of inherent presidential power. It seems likely that the three Presidents would have acted as they did, even without the resolutions. Eisenhower, in fact, did not claim to be acting pursuant to the Middle East Resolution when he intervened in Lebanon in July 1958, presumably because Congress had authorized force only when the attack came from a communist state. Johnson relied more heavily on the Gulf of Tonkin resolution, since in terms of its language it certainly authorized the war he waged. See the discussion in LEOPOLD at 792-96; Note, 81 HARV. L. REV., *supra* note 2, at 1792-93.

The executive interpretation of the Gulf of Tonkin Resolution has been bitterly contested as a misreading of congressional intent. *E.g.*, Velvel, *supra* note 2, at 472-79. The fact that this controversy could arise, however, points to a fundamental characteristic of recent congressional participation in decisions regarding the use of force. With the Gulf of Tonkin Resolution as perhaps the most egregious example, the acts in question have tended to be blank checks, leaving so much to presidential discretion as to vitiate their impact as anything other than demonstrations of national unity in time of crisis. See the discussion in WORMUTH at 43-53; Pusey, *The President and the Power To Make War*, THE ATLANTIC MONTHLY, July, 1969, at 65; Note, 81 HARV. L. REV., *supra* note 2, at 1802-05.

seen. Should it come to fruition, it is difficult to determine whether it will be a return to nineteenth century collaboration or early twentieth century obstruction. Much will depend on Congress' ability to act decisively and quickly and on the nature of its decisions. And much will rest not only on the willingness of the President to involve Congress in the making of foreign policy but also upon congressional insistence that he do so.

The Factors Contributing to Presidential Ascendancy

To talk of causation is always hazardous business. It seems, however, that the growth of presidential power over foreign relations⁶⁰ has resulted largely from factors which can be grouped into three broad categories: historical developments; institutional aspects of the presidency which have made it more responsive to these developments than Congress; and finally, the greater willingness of many Presidents, than many Congresses, to exercise their constitutional powers to the fullest—and perhaps beyond. Among the relevant historical forces, the most important three are the ever-increasing pace, complexity and hazards of human life.⁶¹ To meet the heightened pace of contemporary events, a premium has been placed on rapid, decisive decision-making. To deal with the complexity of the times, government by experts—men with access to relevant facts and with the capacity to fashion appropriate policies—has increasingly become the norm.⁶² To survive the recurrent crises, there is emphasis on leadership which is always ready to respond and which can act flexibly and, if necessary, secretly. Moreover, there is continual concern that government be able to implement effectively whatever policies it adopts.

The presidency enjoys certain institutional advantages which make it a natural focus for governmental power, especially during times of rapid change, complexity and crisis. These advantages stem largely from the fact that the President, unlike Congress, is one rather than many. As a single man, always on the job, he is able to move secretly

⁶⁰ Executive control over domestic affairs has also increased, but presidential dominance in this area is notably less complete than in external matters. See Schlesinger, *The Limits and Excesses of Presidential Power*, SATURDAY REV., May 3, 1969, at 18-19.

⁶¹ The increased pace, complexity and hazards have resulted from the demographic, technological and ideological explosion of the past hundred years. These factors have also produced a burgeoning interaction and interdependence among the peoples of the world. See note 19 *supra*.

⁶² See Bracher, *Problems of Parliamentary Democracy in Europe*, 93 DAEDALUS 179, 183-85 (Winter 1964).

when the need arises, and to combine rapid, decisive action, with the flexibility in policy demanded by quickly changing developments. His singularity and continuity also facilitate long-range planning. Because he is at the center of an unsurpassed information network and because he is assisted by countless experts,⁶³ the possibility exists that his decisions will take into account the complexity of the problems faced. As the Chief Executive, he has more leverage in implementing his decisions than any other organ of government. These institutional advantages, though important in domestic affairs, are unusually significant in the conduct of foreign relations where unity, continuity, the ability to move swiftly and secretly, and access to up-to-date information are more often of the essence.⁶⁴

A second historical development fundamental to the rise of the presidency has been the growing ability of the government to communicate directly with the governed. Beginning with an upsurge in newspaper circulation in the late 1800's and continuing with radio, motion pictures and now television, the capacity of decision-makers to go directly to the electorate has greatly increased, providing a tremendous opportunity to mold public opinion. Heightened ability to communicate directly with the people has redounded largely in favor of the President. As a single rather than a collective decision-maker, he provides an easy target for the public and the media to follow. As the country's chief initiator and implementor, rather than its leading deliberator and legislator, he provides a more exciting and thus newsworthy target. As the country's master of ceremony and the head of its first family, he commands attention. Walter Bagehot, in his celebrated treatment of the English constitution, adopted a phrase, "intelligible government," which describes contemporary presidential government perhaps better than it did the constitutional monarchy of Victoria. Bagehot argued that the great virtue of a monarchy, as opposed to a republic, was that it provided the people with a government which they could understand—one which acted, or so they thought, with a single royal will and provided a ruling family to whom

⁶³ For a discussion of the establishment, elements and functions of the Executive Office of the President, see C. ROSSITER, *supra* note 21, at 127-34.

⁶⁴ See THE FEDERALIST No. 64, at 273-74 (C. Beard ed. 1948) (J. Jay); *id.* No. 75, at 319-20 (A. Hamilton). It has been frequently stated, by de Tocqueville and Woodrow Wilson among others, that the power of the executive grows in relation to a nation's involvement in foreign affairs. See AMERICAN HERITAGE, *supra* note 13, at 265; C. ROSSITER, *supra* note 21, at 85-86.

they could relate.⁶⁵ The President provides intelligible government par excellence, and, unlike Victoria, he rules as well as reigns. Aware of their newsworthiness, Presidents seek to use it to further their ends.⁶⁶ The presidential press conference, special address and grand tour have provided effective tools for winning public support for executive policies,⁶⁷ especially those dealing with foreign affairs.⁶⁸

⁶⁵ The best reason why Monarchy is a strong government is, that it is an intelligible government. The mass of mankind understand it, and they hardly anywhere in the world understand any other. It is often said that men are ruled by their imaginations; but it would be truer to say they are governed by the weakness of their imaginations. The nature of a constitution, the action of an assembly, the play of parties, the unseen formation of a guiding opinion, are complex facts, difficult to know, and easy to mistake. But the action of a single will, the fiat of a single mind, are easy ideas: anybody can make them out, and no one can ever forget them.

W. BAGEHOT, *THE ENGLISH CONSTITUTION* 30 (World's Classics ed. 1949). Bagehot admitted that there exist an "inquiring few" for whom "intelligible government" is less important, because they can handle the "complex laws and notions" of constitutional rule. *Id.* Presumably, the "inquiring few" constitute a significant portion of the present American electorate.

⁶⁶ Theodore Roosevelt was the first President to appreciate fully and capitalize upon the Executive's appeal to the media. For an account of Roosevelt's use of the press, see AMERICAN HERITAGE, *supra* note 13, at 266-67.

⁶⁷ See C. ROSSITER, *supra* note 21, at 33, 114-18. A French commentator has observed: [I]n the realm of information, the political system of the United States has a real institution unforeseen in the Constitution: the presidential press conference. The importance of the press conference as a test of the American Chief Executive has often been noted. It should be emphasized that the institution of the press conference makes the press the representative of public opinion and gives to the press the role of intermediary between the citizens and their government which classic theory reserved to the legislature. It is characteristic that American senators and representatives often put their questions to the President by getting friendly or sympathetic reporters to ask certain questions at a presidential press conference.

Grosser, *The Evolution of European Parliaments*, 93 DAEDALUS 153, 159 (Winter 1964).

⁶⁸ The foreign tour focuses attention on the President and, if successful, enhances his political stature, thereby promoting his policies. Inherent in most foreign relations pronouncements of the Executive, particularly those dealing with the use of force, is an opportunity to "shield and enhance his authority by wrapping the flag around himself, invoking patriotism, and national unity, and claiming life-and-death crisis." Schlesinger, *supra* note 60, at 18. John Kennedy's dramatic address to the nation on October 22, 1962, certainly ranks among the most effective uses of the media to rally support for a presidential decision to use force abroad.

Far more than in domestic affairs, contemporary Presidents seem willing to argue their foreign policies directly before the people. Grosser, *supra* note 67, at 159, comments:

[T]he American presidential system, with the separation of powers, virtual direct election of the President and his nonparticipation in congressional debates, facilitates . . . recourse to a means of disseminating information that bypasses the legislature; but the situation is a phenomenon of modern civilization and not of institutional machinery. "The President from time to time shall report to the Congress on the State of the Union." The Founding Fathers certainly did not

A third force enhancing the position of the Executive has been the democratization of politics,⁶⁹ primarily a result of the way in which our political parties developed. While the party system has made increasingly democratic the process of electing the President, and given him a natural role as the external leader of Congress, it has done little to facilitate decisive action by the legislators and has left them exposed to the play of special interests.⁷⁰ The President rather than Congress has come to be seen as the symbol of national unity, as the chief guardian of the national interest, and as the most democratic organ of government.⁷¹ Consequently, the capture of the presidency has become the primal objective of American politics.

It was not unnatural that the focus of party politics became the quest for the presidency, particularly in view of its notable power and the Presidents' unusual capacity to provide the heroes and folklore needed to cement party followers and the country into a cohesive whole.⁷² Nor was democratization of the presidential nomination and election processes an abnormal development, since the President, institutionally, is the sole politician with a national constituency. This reality was appreciated and exploited first by Andrew Jackson, but received perhaps its classic statement from James K. Polk in his final annual message to Congress:

If it be said that the Representatives in the popular branch of Congress are chosen directly by the people, it is answered, the people

intend this to mean only the annual message to Congress. In the Cuban crisis of October, 1962, a statement to Congress would have corresponded to the text of the Constitution, rather than a televised talk to the nation.

⁶⁹ See C. ROSSITER, *supra* note 21, at 88-89.

⁷⁰ See C. ROSSITER, *PARTIES AND POLITICS IN AMERICA* 17-24, 60-61, 62 (1960).

⁷¹ E. CORWIN, *supra* note 14, at 307, states in resume:

In short, the Constitution reflects the struggle between two conceptions of executive power: that it ought always to be subordinate to the supreme legislative power, and that it ought to be, within generous limits, autonomous and self-directing; or, in other terms, the idea that the people are *re-presented* in the Legislature *versus* the idea that they are *embodied* in the Executive. Nor has this struggle ever entirely ceased, although on the whole it is the latter theory that has prospered. . . . "Taken by and large, the history of the presidency has been a history of aggrandizement."

⁷² According to C. ROSSITER, *supra* note 21, at 107, the great Executives are more than eminent characters and strong Presidents. They were and are luminous symbols in our history. We, too, the enlightened Americans, feel the need of myth and mystery in national life And who fashioned the myth? Who are the most satisfying of our folk heroes? With whom is associated a wonderful web of slogans and shrines and heroics? The answer, plainly, is the six Presidents I have pointed to most proudly.

For a discussion of the folklore of the Presidency, see AMERICAN HERITAGE, *supra* note 13, at 197-208.

elect the President. If both Houses represent the States and the people, so does the President. The President represents in the executive department the whole people of the United States, as each member of the legislative department represents portions of them.⁷³

A fourth factor might best be termed good fortune—the frequent election of charismatic, far-sighted men to serve as President during times of great need. It is probably true that without crisis, it is difficult for a man to perform mighty acts. The converse—that given an emergency the incumbent Chief Executive will necessarily rise to meet it—does not hold. Some Presidents, so confronted, have been restrained by their concept of the presidency⁷⁴ and some by their ineptitude.

⁷³ Quoted in AMERICAN HERITAGE, *supra* note 13, at 94. A 1966 statement by Lyndon Johnson seems to go beyond Polk. The President declared that “[t]here are many, many who can recommend, advise, and sometimes a few of them consent. But there is only one that has been chosen by the American people to decide.” Schlesinger, *supra* note 60, at 17.

⁷⁴ Presidents, like most other members of the American body politic, voluntarily obey its rules. Accordingly, their concept of the limits of their constitutional powers has a great bearing on the action which they are willing to take. It seems that presidential opinion has ranged widely, from the modest views of Buchanan to the brash interpretations of Franklin Roosevelt. Taft stated the basic tenet of the former in these words: “The true view of the executive functions . . . is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary.” Quoted in E. CORWIN, *supra* note 14, at 153. Buchanan adhered rigidly to his concept of the limits of his powers, going so far as to reject an 1860 Virginia proposal for a conference of states and, pending its conclusion, an agreement between the Secessionists and the President to abstain from violence. Buchanan strongly favored the plan but refused to act, stating:

Congress, and Congress alone, under the war-making power, can exercise the discretion of agreeing to abstain “from any and all acts calculated to produce a collision of arms” between this and any other government. It would therefore be a usurpation for the Executive to attempt to restrain their hands by an agreement in regard to matters over which he has no constitutional control.

Quoted in WORMUTH at 12.

At the other extreme, Franklin Roosevelt believed that he possessed constitutional power to act even in direct opposition to existing law, if an emergency so warranted. E. CORWIN, *supra* note 14, at 251. His position resembled the executive “prerogative” formulated by John Locke “as the ‘power to act according to discretion for the public good, without the prescription of law and sometimes even against it.’” Quoted in *id.* at 8. Roosevelt’s activities leading to United States involvement in hostilities with Germany in the Atlantic were of dubious legality, if not clearly contrary to law upon occasion. See E. CORWIN, *supra* note 39, at 22-29. His September 7, 1942, dictate to Congress ordering the repeal of a certain provision of the Emergency Price Control Act was clearly in accord with the Lockian prerogative. See E. CORWIN, *supra* note 14, at 250-52.

Midway between Buchanan’s and Franklin Roosevelt’s reading of their constitutional

More Presidents than not, however, have provided the requisite leadership, with a corresponding increase in the power and prestige of the office.⁷⁵

Finally, there is a momentum to the President's burgeoning influence. With each new function that the Executive has assumed, with each crisis that he has met, with each corresponding rise in his prestige, in popular expectations, in presidential folklore and myth, the office has become more potent. The President's varied powers feed upon one another to produce an aggregate stronger than the sum of his individual responsibilities.⁷⁶

Presidential control over governmental affairs has been matched by a decline in congressional influence. Although Congress remains a powerful body, far more so than the legislature of any other sizable nation, the times in which it was able to dominate public affairs have passed. The existence of two co-equal houses militated against its ever being able to assert complete supremacy, thereby relegating the Executive to a ceremonial role. Unlike the institutional characteristics of

authority stands the "Stewardship Theory," described by Theodore Roosevelt in these terms:

My view was that every executive officer . . . was a steward of the people My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws. . . . In other words, I acted for the public welfare . . . whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition.

Quoted in *id.* at 153. Few today would deny that the President has at least this much authority. See *id.* at 147-58. See generally A. SCHLESINGER, *supra* note 13, at 5-13.

⁷⁵ See the discussion in C. ROSSITER, *supra* note 21, at 89-114, 145-78. Arthur Schlesinger aptly notes that most advances in presidential power have engendered a counter-reaction, so that presidential aggrandizement has by no means been an uninterrupted progress forward. A. SCHLESINGER, *supra* note 13, at 15.

⁷⁶ As Clinton Rossiter lyrically noted, during an era when executive aggrandizement was viewed with greater tranquility than today:

The Presidency . . . is a wonderful stew whose unique flavor cannot be accounted for simply by making a list of its ingredients. It is a whole greater than and different from the sum of its parts, an office whose power and prestige are something more than the arithmetical total of all its functions. The President is not one kind of official during one part of the day, another kind during another part—administrator in the morning, legislator at lunch, king in the afternoon, commander before dinner, and politician at odd moments that come his weary way. He is all these things all the time, and any one of his functions feeds upon and into all the others.

C. ROSSITER, *supra* note 21, at 41. Rossiter breaks down the various functions presently in the Executive's preserve as follows: (1) five responsibilities clearly stemming from his constitutional duties: Chief of State, Chief Executive, Commander-in-Chief, Chief Diplomat, Chief Legislator, and (2) five additional functions that have evolved over time: Chief of Party, Voice of the People, Protector of the Peace, Manager of Prosperity, and World Leader. For a discussion of each, see *id.* at 16-41.

the presidency, those of Congress have not attracted power during times of rapid change, complexity and recurrent crisis. The multitudes who make up the two houses of Congress, their constitutional task of deliberation and authorization, the decision-making process necessitated when many men are engaged in a legislative endeavor, and the diversity of the legislators' constituencies inevitably make Congress a more ponderous, public and indecisive decision-maker than the President, and one, it seems, in need of external guidance.⁷⁷

Much of Congress' present eclipse, however, stems not from such inexorable factors, but rather from its own unwillingness to reform.⁷⁸ Unlike many Presidents, who have made a studied effort to adopt procedures which would enable them to wield power effectively, Congress has generally been reluctant to part with old ways, even at the cost of diminishing influence. Congressional decision-making procedures could be streamlined, its access to information and expert advice could be appreciably heightened, and its attention could be focused more on national problems and less on local and personal matters. Moreover, its regrettable public image could be improved by skillful use of the media. Latent congressional power to investigate, to set policy and to supervise exists should Congress choose to exercise it.⁷⁹ Beyond its inaction and image, the eclipse of Congress in this century can be attributed to its proclivity, when it does act, to make decisions unresponsive to the needs of the times.⁸⁰ Thus, a reversal of congressional fortunes will require not only a capacity to act but also the ability to make sound decisions.

Restraints on the Exercise of Presidential Power

Powerful as he has become, the President remains bound by numerous restraints. Fundamental limits on his action result from his own beliefs and from his own leadership ability. As noted earlier, the Presi-

⁷⁷ Rossiter goes further to suggest that even when Congress does act effectively, the result frequently is to increase the power of the President, since the implementation of congressional policy must often be left to him. *Id.* at 87-88.

⁷⁸ See Kurland, *supra* note 2, *passim*. Kurland argues that the ultimate responsibility for congressional decline lies with the people and not the legislators, since the electorate is concerned far more with ends than means; thus the voters exert little or no pressure on Congress to see to its own institutional well-being, so long as presidential policies are popular. *Id.* at 635. Credence is given this argument by the sudden embarrassment of those elements in the academic community who found presidential prerogative quite satisfying until Vietnam. See Schlesinger, *supra* note 60, at 17.

⁷⁹ See notes 165-77 *infra* and accompanying text.

⁸⁰ See Schlesinger, *supra* note 60, at 19.

dent generally acts within the law not so much because he fears the consequences of disobedience as because he voluntarily supports the system of which it is a part. Admittedly, when the question is the extent of his constitutional powers to respond to what he views as a threat to the country, an activist Chief Executive may find an unusually broad grant of authority.⁸¹ But even if the President decides that a given course of action would be legal, it will fail miserably if he is unable to persuade⁸² those whose assistance is essential to gain support for it, for there are very few matters of consequence which can be wholly accomplished by presidential dictate. Though it is unlikely, for example, that his order to dispatch troops to a foreign conflict would be disobeyed, his power to keep the troops in the field for a sustained period rests on his ability to convince the country of the wisdom of his policies. Even should the Executive win initial support for his action, if it proves ill-advised his freedom to pursue the policy will be short-lived.

Beyond these internal restraints lie a series of external limits. The President must be careful at all times to honor the bounds set by prevailing standards of "private liberty and public morality."⁸³ Clinton Rossiter aptly states that "[i]f [the President] knows anything of history or politics or administration, he knows that he can do great things only within 'the common range of expectation,' that is to say, in ways that honor or at least do not outrage the accepted dictates of constitutionalism, democracy, personal liberty, and Christian morality."⁸⁴ Lyndon Johnson's Vietnam debacle can be traced in good part to the offense the war caused various elements in the country on these scores. Arguably, again in the wake of Mr. Johnson's experience, it seems that a contemporary Chief Executive must take almost equal care not to offend the public sense of taste and style. To overstep any of these bounds risks a loss of public support, which, once gone, is difficult

⁸¹ See the discussion of Franklin Roosevelt in note 74 *supra*.

⁸² See R. NEUSTADT, *PRESIDENTIAL POWER, THE POLITICS OF LEADERSHIP* (1960).

The President of the United States has an extraordinary range of formal powers, of authority in statute law and in the Constitution. Here is testimony that despite his "powers" he does not obtain results by giving orders—or not, at any rate, merely by giving orders. He also has extraordinary status, *ex officio*, according to the customs of our government and politics. Here is testimony that despite his status he does not get action without argument. Presidential *power* is the power to persuade.

Id. at 23.

⁸³ C. ROSSITER, *supra* note 21, at 46.

⁸⁴ *Id.* at 70.

to recover. An undercurrent of suspicion and even hatred of the President as a potential despot runs throughout American history;⁸⁵ an administration which brings it to the surface for whatever reason sacrifices much of its future effectiveness.

Other centers of power—both by what they do and what they might do—greatly restrain presidential action. Three competing institutions are particularly important: the federal bureaucracy, Congress and the judiciary. To implement his policies, the President must have the cooperation of the civil and military personnel who actually operate the governmental machinery. Since most of the bureaucracy falls within the presidential chain of command, obtaining their obedience ought to be among his less pressing problems. Such, however, is not the case. While the move toward rule by experts has increased presidential power at the expense of congressional, it has done even more to enlarge and strengthen the “permanent government.”⁸⁶ Each incoming Executive, for example, inherits a mass of departments, agencies and committees, all committed to the expert conduct of foreign affairs. He directly appoints only the high command of most of these entities, and often has trouble controlling even his personal appointees. Feuds within the executive hierarchy and deliberate refusal by high officials to implement presidential policies are not unknown.⁸⁷

The President’s difficulties with his own people are minor beside the problems he faces in persuading the permanent officials to cooperate. Most were in place before his administration took office and most will survive it. They may passively oppose presidential policy by exhibiting great reluctance to alter existing procedures and programs,⁸⁸ or they may actively seek to determine national policy by pressing forward their own plans. Since Eisenhower’s famed warning against the military-industrial complex, there has been increasing fear that this element of

⁸⁵ All strong Presidents, no matter how grateful posterity might be, have awakened the strange undercurrent of hatred, the persistent fear that the Founding Fathers had bequeathed a potential elective monarchy to the United States. The Kennedys were frequently referred to as a royal family, sometimes with affectionate mockery, more often with malice and suspicion. The latest example of the literature of antipresidential fantasy, Barbara Garson’s pastiche *MacBird*, is bound by the same queer compulsion. Portraying Lyndon Johnson as the Macbeth-like assassin of Kennedy, it is a drama of monarchy and usurpation. . . . [I]t reveals obsessions akin to those of . . . bizarre bygone items . . .

AMERICAN HERITAGE, *supra* note 13, at 182.

⁸⁶ The term comes from A. SCHLESINGER, *supra* note 13, at 16.

⁸⁷ See, e.g., Morgenthau, *supra* note 11, at 265-67.

⁸⁸ See, e.g., C. ROSSITER, *supra* note 21, at 59-62; A. SCHLESINGER, *supra* note 13, at 94-97.

the permanent government may be shaping basic national policies.⁸⁰ Even when the relevant parts of the bureaucracy attempt to implement presidential programs, they often fail for a variety of reasons, including, in some cases, incompetence. The diplomatic-military apparatus in Vietnam, for example, had only limited success in its good faith effort to realize Johnson's objectives.

Difficult as the bureaucracy may be, a greater limit upon presidential power is Congress.⁹⁰ In Richard Neustadt's words, we have "a government of separated institutions *sharing* powers."⁹¹ Thus, virtually all presidential programs and ventures require implementing legislation and funding. Unlike parliamentary executives, the President has no ultimate weapons, such as dissolution or excommunication from party ranks, with which to beat reluctant legislators into submission. As a result, an abiding concern of the Executive and his assistants is the likely reaction of Congress to their proposals and actions.⁹²

Legislators have a number of tools with which to restrain the President. Through legislation, they can restrict his options, hamstringing his policies and, to an extent, even take the policy initiative from him.⁹³ It has been suggested that Congress is presently attempting to control the Executive by qualified legislation more than in the past,⁹⁴ and the movement headed by Senator Fulbright, if successful, would certainly

⁸⁰ It is not wholly accurate to describe the military-industrial complex as a part of the permanent government, for, broadly defined, it includes groups with no official or unofficial ties to the state.

It is a vast, amorphous conglomeration that goes far beyond the Pentagon and the large manufacturers of weapons. It includes legislators who benefit politically from job-generating military activity in their constituencies, workers in defense plants, the unions to which they belong, university scientists and research organizations that receive Pentagon grants. It even extends to the stores where payrolls are spent, and the landlords, grocers and car salesmen who cater to customers from military bases.

The Military: Servant or Master of Policy, TIME, April 11, 1969, at 23. See *id.* at 20-26; *The Military-Industrial Complex*, NEWSWEEK, June 9, 1969, at 74-87; AMERICAN HERITAGE, *supra* note 13, at 287-88.

⁹⁰ See C. ROSSITER, *supra* note 21, at 49-56.

⁹¹ R. NEUSTADT, *supra* note 82, at 42.

⁹² [A]s I saw the executive branch in action, [i]t was haunted by a fear and at times an exaggerated fear of congressional reaction. The notion that the executive goes his blind and arrogant way, saying damn the torpedoes, full speed ahead, is just not true. I would say a truer notion is that the executive branch cowers day and night over the fear and sometimes quite an exaggerated and irrational fear of what the congressional response is going to be to the things it does.

A. SCHLESINGER, *supra* note 13, at 171; *accord*, e.g., Morgenthau, *supra* note 11, at 267.

⁹³ See Morgenthau, *supra* note 11, at 263-64.

⁹⁴ A. SCHLESINGER, *supra* note 13, at 17. *But see* Kurland, *supra* note 2, at 629-31.

reduce presidential freedom in foreign affairs.⁹⁶ Through the power of the purse, the legislators can similarly limit the President. Although control of the purse has been virtually a nonpower in the hands of cold war Congresses when funds were sought for the military, present reluctance to embark on major defense spending and criticism of the military establishment⁹⁷ suggest that appropriations may emerge anew as a limiting factor. A few voices have even been heard to suggest that funds supporting troops in the field be cut—traditionally, an unthinkable position.⁹⁷

The power of congressional committees to investigate and oversee, as the 1967 Fulbright hearings indicate, provides a means of sparking national debate, molding opinion and thereby influencing presidential action. Activity within Congress can frequently focus outside political pressure and bring it to bear on the Chief Executive. Similarly, legislators can work the political process privately as well, communicating quietly with the President to persuade him that his ideas are ill-advised or subject to great potential opposition. Congress can also work in tandem with rebellious elements in the bureaucracy to thwart presidential initiatives. Remote though the possibility is, the President must remain aware of the congressional capacity to impeach him or to censure his conduct by resolution—a fate that befell Polk at the hands of a House disturbed by his role in initiating the Mexican War.⁹⁸ The President is also continually hemmed in by the play of the political system—by sniping from members of the opposition party and by the demands and feelings of members of his own party.⁹⁹

⁹⁶ On June 25, 1969, the Senate by a vote of 70-16 adopted the following resolution, a modified version of the one Senator Fulbright had introduced almost two years earlier:

Resolved, That (1) a national commitment for the purpose of this resolution means the use of the armed forces of the United States on foreign territory, or a promise to assist a foreign country, government, or people by the use of the armed forces or financial resources of the United States, either immediately or upon the happening of certain events, and (2) it is the sense of the Senate that a national commitment by the United States results only from affirmative action taken by the executive and legislative branches of the United States Government by means of a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment.

S. Res. 85, 91st Cong., 1st Sess., 115 CONG. REC. S7153 (daily ed. June 25, 1969). For a further discussion of Congress and national commitments, see 48 CONG. DIG. 193-224 (1969).

⁹⁶ See note 1 *supra*.

⁹⁷ See note 21 *supra*.

⁹⁸ See note 48 *supra* and accompanying text.

⁹⁹ C. ROSSITER, *supra* note 21, at 62-64.

Finally, the Senate is constitutionally empowered to advise and consent to presidential treaties and appointments and has devised the power to delay and negate by filibuster. These senatorial prerogatives, coupled with the power of Congress over the legislation and appropriations necessary to implement the President's foreign policies, constitute the primary restraints on his action.

To date, the courts have served more to enlarge the presidential prerogative over foreign affairs than to restrain it.¹⁰⁰ The one opinion directly treating the scope of presidential power to use force abroad—an 1860 decision dealing with an 1854 reprisal against a small, stateless town in Central America¹⁰¹—took a broad view of the President's constitutional powers. Although given ample opportunity to speak in the Vietnam context, federal courts have uniformly refused to consider whether the conflict is unconstitutional for lack of congressional

¹⁰⁰ See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *The Prize Cases*, 67 U.S. (2 Black) 635 (1863); *Myers v. United States*, 272 U.S. 52, 116-18 (1926) (dictum); *In re Neagle*, 135 U.S. 1, 63-68 (1890) (dictum); C. ROSSITER, *supra* note 21, at 56-59; C. ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF passim* (1951).

¹⁰¹ *Durand v. Hollins*, 8 F. Cas. 111 (No. 4186) (C.C.S.D.N.Y. 1860). The court stated in part:

As the executive head of the nation, the president is made the only legitimate organ of the general government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens. It is to him, also, the citizens abroad must look for protection of person and of property, and for the faithful execution of the laws existing and intended for their protection. For this purpose, the whole executive power of the country is placed in his hands, under the constitution, and the laws passed in pursuance thereof; and different departments of government have been organized, through which this power may be most conveniently executed whether by negotiation or by force—a department of state and a department of the navy.

Now, as it respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the president. Acts of lawless violence . . . cannot be anticipated . . . and the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action. Under our system of government, the citizen abroad is as much entitled to protection as the citizen at home.

Id. at 112.

Although Captain Hollins burned the town in question long after the alleged attack on United States interests, the opinion speaks, not of a reprisal, but of a rescue situation, and grants the President broad powers to respond quickly to save threatened citizens and their property. WORMUTH at 22-24, 31-32, argues that the destruction of the town was strongly condemned by contemporary public and congressional opinion, and suggests that the *Durand* decision was an attempt by the judge, "a partisan Democrat, . . . to vindicate the action of a Democratic President." *Id.* at 32.

authorization.¹⁰² The possibility remains, nonetheless, that an activist court, convinced of the unconstitutionality of presidential action, could order the Executive to desist. President Truman's immediate acceptance of the Supreme Court's ruling in the *Steel Seizure* case¹⁰³ suggests that a judicial command affecting the use of force abroad would be obeyed by the executive branch¹⁰⁴—although perhaps not without great political cost to the Court and great stress upon our constitutional system.

¹⁰² See note 7 *supra*.

¹⁰³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹⁰⁴ To a significant extent, it is possible to equate a decision such as *Youngstown*, which ordered the return to private management of domestic steel companies seized by executive command, with a hypothetical judicial decision ordering the President to withdraw troops from a conflict to which he has unilaterally committed them, unless he obtains immediate congressional authorization for their use. Both decisions affect American participation in foreign conflict. President Truman, for example, seized the steel mills restored in *Youngstown* because

[a]ll the members of the Cabinet agreed . . . that it would be harmful to the country and injurious to our campaign in Korea if our steel mills were allowed to close down. We were then not only trying to keep our forces in Korea, as well as elsewhere, fully equipped, but we had allies to whom we had promised arms and munitions, and whose determination to resist Communism might depend on our ability to supply them the weapons they so badly needed.

H. TRUMAN, MEMOIRS, *quoted in* A. WESTIN, *THE ANATOMY OF A CONSTITUTIONAL LAW CASE* 9 (1958). The hypothetical decision, should Congress approve the President's action, would have only the psychological effect inherent in a judicial declaration that the war had been unconstitutionally waged in the past. Should Congress refuse authorization and the President withdraw the troops, the decision would be instrumental in reversing presidential war policy.

Although the decisions typified by *Youngstown* and the hypothetical both have strong foreign policy overtones, presidential obedience to the former is more assured. First, a *Youngstown* decision will generally enjoy greater domestic political support. Executive action the direct effects of which are felt primarily within this country will usually generate more political opposition than action whose principal effects are felt abroad. Thus, seizure of the steel industry is riskier for the President than waging war in Asia. Moreover, executive action which affects the well-established rights of powerful individuals in this country is more likely to spark political backlash than action that impinges upon the more inchoate rights of less powerful persons. Since Congress is unlikely to bring an action against the President for infringement of its right to participate in war decisions, the plaintiff in the hypothetical case would probably be a serviceman seeking to avoid participation in the conflict. See note 7 *supra*. Unlike the property rights at issue in *Youngstown*, a draftee or reservist's right to avoid involvement in an unauthorized war is not an interest that our legal system has traditionally recognized as worthy of protection. Further, the draftee's political power is miniscule compared to that of the steel magnate. Only when a series of draft cases has evoked significant moral and political condemnation do they begin to have a potential effect akin to *Youngstown*.

Second, presidential disregard of a court order is more difficult when compliance requires action solely within the United States and the reversal of a course of action whose substance has consisted largely of official proclamations. The steel mills, for

The ultimate restraint upon the President, however, does not come from his own beliefs and abilities or from competing centers of power, but rather from the activities of the electorate, which continually expresses its views in various manifestations of public opinion, and periodically in federal elections.¹⁰⁵ A President will fall from grace when his policies fail to meet popular needs and demands or when they involve him in activity which is widely viewed as illegitimate, because it transgresses popular conceptions of legality or morality.¹⁰⁶ An unpopular President and his supporters will ultimately be turned out of office, but before their dismissal, executive policies and personnel will have come back under attack from other centers of power, emboldened by the President's diminished popular standing.¹⁰⁷ Attacks from these centers will, in turn, further reduce popular confidence in the administration. The President will find it increasingly difficult to govern, even in areas distantly divorced from those in which his actions have offended the public.¹⁰⁸ Once lost, the mandate of heaven is difficult to regain.

example, could be returned to private ownership by an executive order rescinding the earlier seizure decree. It would be far easier for the President, as Commander-in-Chief, to disregard or subvert an order to bring home hundreds of thousands of troops from a distant country.

It is probable, however, that a President confronted with the hypothetical decision would seek congressional approval and, should it not be forthcoming, would like most other Americans, voluntarily obey the rules of our society, including the one which places final authority on constitutional questions in the hands of the Supreme Court. Thus, unless the President felt that the security of the country was utterly dependent upon prosecution of the war, he would be most unlikely to defy the Court. Moreover, even if the President were inclined to disregard its command, he would be restrained by knowledge that defiance could result in a constitutional crisis of disastrous consequences both for the legitimacy of his administration and the stability of the country.

¹⁰⁵ Since the success of American foreign policy frequently depends on the actions of other states and their peoples, executive use of force abroad is subject to their opinions and leadership selections, as well as to those of the American electorate.

¹⁰⁶ See notes 83-85 *supra* and accompanying text.

¹⁰⁷ These centers, of course, can act before public sentiment turns against the executive policies in question, and may be instrumental in effecting the shift. The Fulbright hearings, for example, led rather than followed public opinion. A. SCHLESINGER, *supra* note 13, at 106, does not believe that "there can be any question that the Senate Foreign Relations Committee opened up a national debate where one had really not existed before. The educational job performed by the senators on Vietnam has been quite extraordinary."

¹⁰⁸ The Presidency is "an unwieldy vessel which can navigate only when it has built up a head of steam and is proceeding at a brisk speed. When the pressure is dissipated and the speed drops, the craft is at the mercy of the elements" AMERICAN HERITAGE, *supra* note 13, at 275.

In sum, during the last several decades the allocation of power between the President and Congress over the control of foreign relations has been heavily weighted in favor of the Executive. His hegemony has resulted from the interplay of a number of factors, most of them a result of the presidency's institutional advantages in meeting contemporary challenges and opportunities. Nevertheless, executive control over foreign policy is hardly without its limits, both actual and potential.

THE BALANCE BETWEEN PRESIDENT AND CONGRESS: RULES

The Constitution

With the foregoing overview of practice, it will be helpful now to consider expectations—people's rule-based beliefs concerning the constitutional scope of the President's authority—irrespective of the actualities of his conduct. The appropriate place at which to begin such an investigation is with the language of the relevant constitutional provisions which appear in articles I and II. They may be divided into four categories: grants dealing with foreign affairs as a whole; those concerning specifically the military aspects of foreign affairs; grants of inherent, nonenumerated powers; and provisions providing the President and Congress, respectively, with weapons with which to coerce one another.

In the first category, the President is modestly endowed, at least in terms of formal, stated grants of power. Generally, he holds the executive power of the Government¹⁰⁹ and has the authority to request the executive departments to report to him,¹¹⁰ as well as the power to nominate men to fill principal offices.¹¹¹ He is enjoined to see that federal law is faithfully executed and to inform Congress periodically of the state of the nation¹¹² and is authorized to present Congress with legislative recommendations.¹¹³ More specifically, the President is empowered to make treaties and diplomatic appointments with the approval of the Senate,¹¹⁴ and he is commanded to receive foreign diplomats.¹¹⁵

¹⁰⁹ U.S. CONST. art. II, § 1.

¹¹⁰ *Id.* § 2.

¹¹¹ *Id.*

¹¹² *Id.* § 3.

¹¹³ *Id.*

¹¹⁴ [The President] . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, . . . and all

Congress has more extensive powers in this category. Generally, and legislators hold all the legislative power of the Government,¹¹⁶ exercising the power over appropriations, the House having the privilege of initiating all money bills.¹¹⁷ More specifically, Congress as a whole controls a wide range of matters with notable transnational impact, especially in an increasingly interrelated, interdependent world.¹¹⁸ Policies regarding such matters as foreign commerce often fuel international conflict. The Senate, in effect a third branch of government in foreign affairs, has the power to give or withhold consent on treaties and appointments.¹¹⁹

In the second, specifically military category, presidential grants again lag behind their congressional counterparts. The Executive is simply named Commander-in-Chief, and given the power to commission officers.¹²⁰ His appointment prerogative mentioned previously also comes into play in the military sphere. Congress, on the other hand, has a battery of responsibilities, including, *inter alia*, the power to raise and support the armed forces and the power to declare war.¹²¹

other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law

Id. § 2.

¹¹⁶ "[H]e shall receive Ambassadors and other public Ministers" *Id.* § 3.

¹¹⁶ *Id.* art. I, §§ 1, 8.

¹¹⁷ *Id.* § 7.

¹¹⁸ The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts . . .

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations . . .

To establish an uniform Rule of Naturalization . . .

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures . . .

To establish Post Offices . . .

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations

Id. § 8.

¹¹⁹ See note 114 *supra*.

¹²⁰ U.S. CONST. art. II, §§ 2, 3.

¹²¹ The Congress shall have Power To . . . provide for the common Defence . . .

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies . . .

To provide and maintain a Navy;

To make rules for the Government and Regulation of the land and Naval Forces;

To provide for organizing, arming, and disciplining, the Militia, and for gov-

In the third category, inherent powers, the President comes into his own. Whereas article II, section 1 vests in him "the executive Power," article I, section 1 vests in Congress only those "legislative Powers *herein granted*." Moreover, while the legislative article is quite tightly drawn, the executive article, in Corwin's words, "is the most loosely drawn chapter of the Constitution."¹²² Thus, the President can make a strong case that, as the holder of the executive power, he possesses residual authority to go beyond his enumerated powers to take whatever steps he deems necessary for the country's security. Congress, to the contrary, confronts a linguistic hurdle. Arguably, however, "herein granted" is not an insurmountable barrier where foreign policy is involved.¹²³

In the final, coercive category, Congress regains its textual edge. The President can seek to bend the legislators to his will through the threat of veto and special session,¹²⁴ but Congress can virtually destroy him. Impeachment and censure remain remote possibilities, but hostile use or nonuse of legislative power is an ever present mode of persuasion.

Such is the relevant constitutional language. It strongly suggests that both the President and Congress are to have a role in decisions regarding foreign policy, especially those concerned with the use of force. But, as suggested earlier,¹²⁵ the language provides minimal guidance in most concrete situations; the grants are complementary and abstract, and occasionally fail altogether to speak to contemporary problems.

Intent of the Framers

Like their language the intent of the Framers is somewhat ambiguous.

erning such Part of them as may be employed in the Service of the United States . . .

To exercise . . . Authority over all Places purchased . . . for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and needful Buildings

II. art. I, § 8.

¹²² E. CORWIN, *supra* note 14, at 3.

[W]hereas "legislative power" and "judicial power" today denote fairly definable *functions* of government as well as fairly constant *methods* for their discharge, "executive power" is still indefinite as to *function* and retains, particularly when it is exercised by a single individual, much of its original plasticity as to *method*. It is consequently the power of government that is the most spontaneously responsive to emergency conditions; conditions, that is, which have not attained enough of stability or recurrency to admit of their being dealt with according to rule.

13.

¹²³ See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936); M. McDUGAL, *supra* note 14, at 496-503; *cf. id.* at 492-96.

¹²⁴ U.S. CONST. art. I, § 7; *id.* art. II, § 3.

¹²⁵ See notes 14-16 *supra* and accompanying text.

The relevant provisions were written only after long discussion and much compromise—processes certain to breed confusion about the exact nature of the end product. As is the case where many views are advanced, and where the drafters do not know from past experience what demands reality will make upon their rules, much that the Framers adopted was left either vague or unsaid, to be filled in by practice.

The Constitution's foreign affairs provisions were drafted against a background of legislative control of external matters in America,¹²⁶ and of executive domination in Britain.¹²⁷ The Framers wished to alter the American practice to profit from executive speed, efficiency and relative isolation from mass opinion,¹²⁸ without incurring the disadvantages of an unchecked British monarch. Thus, speed and efficiency, on the one hand, and restraint upon executive prerogative, on the other, appear to have been the basic objectives of the Drafters. Accordingly, they created an Executive independent from Congress,¹²⁹ who was

¹²⁶ Prior to the installation of the Constitution on March 4, 1789, the direction of foreign policy was in the hands of a unicameral legislature which functioned through a Committee of Secret Correspondence (1775-7), a Committee for Foreign Affairs (1777-81), and the Department of Foreign Affairs (1781-9). The last was under a secretary who was responsible to the Congress.

LEOPOLD at 67 n.1.

¹²⁷ Madison stated in 1793 that "[t]he power of making treaties and the power of declaring war are *royal prerogatives* in the *British government*, and are accordingly treated as *executive prerogatives* by British commentators. . . ." Quoted in E. CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* 21 (1917); see James Wilson's comment, I *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 65-66 (M. Farrand rev. ed. 1937) [hereinafter cited as *RECORDS*], and Hamilton's Analysis in *THE FEDERALIST* No. 69, at 295 (C. Beard ed. 1948) (A. Hamilton).

¹²⁸ The Framers seem to have been seriously concerned about the "temporary errors and delusions" of the people, their "passing popular whims" and "public passions." See *THE FEDERALIST* No. 49, at 220 (C. Beard ed. 1948) (J. Madison); *id.* No. 63, at 268 (J. Madison); *id.* No. 71, at 303 (A. Hamilton). Thus, they sought a check on mass opinion in a strong President, *id.* No. 71, at 303 (A. Hamilton), and in the Senate's "temperate and respectable body of citizens," *id.* No. 63, at 268 (J. Madison). See also *id.* No. 62, at 263-64 (J. Madison).

¹²⁹ The creation of an Executive, wholly outside the legislative sphere, was by no means a foregone conclusion when the Framers first met. C. ROSSITER, *supra* note 21, at 76-79, suggests that among the crucial decisions taken in favor of a strong Executive were that the office would be separate from the legislature; that it would be held by one man, who would have a source of election outside Congress, and a fixed term subject only to impeachment; that he would be eligible for reelection; that he would be granted his own constitutional powers, and not be saddled with a council whose approval he would have to obtain for various actions; and that he could not be a member of either house of Congress during his presidency. For further discussion, see *id.* at 74-81, 87; *AMERICAN HERITAGE*, *supra* note 13, at 12-24; E. CORWIN, *supra* note 14, at 3-16; A. SCHLESINGER, *supra* note 13, at 6-7.

perhaps at his strongest in external matters. Simultaneously, they placed in both Houses of Congress and in the Senate alone powers designed to prevent unilateral control of foreign relations by the President.¹³⁰

Of the various grants of power to both the President and Congress, the one most central to the present question is the congressional power to declare war. If there are constitutional limits on presidential authority to use the military abroad *sua sponte*, this provision provides them more than any other.¹³¹ "The Congress shall have Power to . . . declare War . . ." could mean any of a number of things, ranging from a relatively meaningless authority to recognize an existing state of large-scale conflict¹³² to the authority to make virtually all decisions regarding the use of force by the United States.

It seems reasonably clear from proposals made and rejected at the Constitutional Convention, from debates there, subsequent statements by

¹³⁰ The Framers intended that the Senate share in the actual execution of certain aspects of our foreign relations. See E. CORWIN, *supra* note 127, at 84-88; THE FEDERALIST No. 64, at 272-74 (C. Beard ed. 1948) (J. Jay); M. McDUGAL, *supra* note 14, at 436-37, 557-59. But in the interests of practicality, the implementation of foreign policy came quickly to rest almost exclusively with the Executive. The legislators retained, however, a strong voice in shaping the policies to be implemented, especially regarding the use of force abroad. See notes 37-48 *supra* and accompanying text.

¹³¹ The Framers also viewed congressional control over the raising and support of the military as a primal check on presidential use of force, whether at home or abroad. See, e.g., THE FEDERALIST No. 26, at 106-07 (C. Beard ed. 1948) (A. Hamilton); *id.* No. 41, at 177 (J. Madison). But with the establishment of a large standing military capacity, the assumption of world-wide defense commitments and a prevailing belief that presidential use of troops abroad requires bipartisan support in the interests of national security, the power of the purse has become relatively meaningless. See note 21 *supra* and accompanying text. In the wake of the disquiet induced by Vietnam, it is possible that Congress will once again use its control of appropriations as a check on the Executive, see text at notes 96, 97 *supra*, although it is unlikely that the President will ever be deprived of the mobile task forces which enable him to intervene abroad on short notice. To use its power over the purse to restrain such action, Congress would have to demonstrate willingness to refuse funds to carry on an intervention once begun, or to fund it only at the cost of other programs the President favors.

¹³² Such recognition may have some effect. A formal declaration of this nature would effectuate certain legal results with potentially profound consequences. Treaties would be canceled; trading, contracts and debts with the enemy would be suspended; vast emergency powers would be authorized domestically; and legal relations between neutral states and the belligerents would be altered. But though there may have been a time when these changes in legal status were uniquely the result of the issuance of a formal declaration, this is clearly no longer true today. Countries have long engaged in undeclared hostilities which in terms of the effort involved, the impact on citizens, and the effect on domestic and international legal relations are often indistinguishable from a formally declared war.

NOTE, 81 HARV. L. REV., *supra* note 2, at 1772 (footnotes omitted).

the Framers and from practice in early years that the Drafters intended decisions regarding the *initiation* of force abroad to be made not by the President alone,¹³³ not by the Senate alone,¹³⁴ nor by the President and the Senate,¹³⁵ but by the entire Congress subject to the signature or veto of the President. The Framers recognized the potentially momentous consequences of foreign conflict and wished to check its unilateral initiation by any single individual or group.¹³⁶ Madison expressed this concern early in the Constitutional Convention: "A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them [wars] on the whole."¹³⁷ Foreign conflicts, since they involve the entire nation, are to be begun only after both legislative houses and the Executive have been heard, even at the cost of some delay in reaching a decision.¹³⁸

¹³³ Mr. Butler, apparently the only proponent of his view, favored "vesting the power in the President, who will have all the requisite qualities [e.g., dispatch, continuity, unity of office] and will not make war but when the Nation will support it." II RECORDS 318.

¹³⁴ Mr. Pinkney opposed the vesting of this power in the Legislature. Its proceedings were too slow. It wd. meet but once a year. The Hs. of Reps. would be too numerous for such deliberations. The Senate would be the best depository, being more acquainted with foreign affairs, and most capable of proper resolutions. If the States are equally represented in Senate, so as to give no advantage to large States, the power will notwithstanding be safe, as the small have their all at stake in such cases as well as the large States. It would be singular for one—authority to make war, and another peace.
Id. (footnotes omitted).

¹³⁵ Hamilton presented a plan in which the Executive was "to make war or peace, with the advice of the senate . . ." I RECORDS 300.

¹³⁶ See note 138 *infra*.

¹³⁷ I RECORDS 316. Madison was speaking to the possibility that individual states through their "violations of the law of nations & of Treaties" might bring foreign war upon the country as a whole. *Id.* The unfortunate consequences of war were alluded to by others among the Framers. Mr. Elseworth, for example, argued that "[i]t shd. be more easy to get out of war, than into it." II RECORDS 319. And Mr. Mason was "for clogging rather than facilitating war . . ." *Id.*

¹³⁸ Objections were made to legislative involvement on this ground. See the comments of Messrs. Butler and Pinkney, II *id.* at 318. But the approach of Mr. Mason proved more persuasive; he stated that he was "agst. giving the power of war to the Executive, because not [safely] to be trusted with it; or to the Senate, because not so constructed as to be entitled to it." *Id.* at 319.

Fear existed that if the President were given the right to wage war unilaterally, he might unwisely engage the country in ruinous conflict or use the existence of war to raise military forces with which to seize control of the country. Moreover, the Executive, like the Senate, was not directly elected, and thus lacked the moral authority to commit the entire country to so potentially devastating a course. The House of Representatives possessed the legitimacy given by direct election, but, due to its close ties to the general public, was suspected of flighty judgment. Accordingly, the

The discussion to this point has been of Congress' power to *initiate* the use of force abroad—to take the country from a state of peace to one of war. When, however, war is thrust upon the United States by another power, the Framers apparently intended that there be unilateral presidential response if temporal exigencies do not permit an initial resort to Congress.¹³⁹ Under such circumstances, there is no longer a need for check and deliberation; all reasonable men would agree that the survival of the nation is worth fighting for; speedy and effective defense measures are the constitutional objectives given a direct attack upon the country.¹⁴⁰ Congressional involvement comes at a later point; as soon as feasible, the legislators are to be given an opportunity to ratify past presidential actions and authorize future conduct.¹⁴¹

Although the Framers did not delineate what constitutes a thrust of conflict upon the United States, it appears that any direct, physical assault upon American territory will suffice.¹⁴² Moreover, if a blow

Representatives' passions were to be controlled by involving the Senate and President in war decisions. Involvement of the Senate, moreover, would ensure that force could not be initiated abroad unless a majority of the states agreed. In short, an attempt was made to devise a scheme in which war would be entered upon only after measured deliberation, thus avoiding involvement in conflicts where the costs, upon reflection, appeared to outweigh the gains, or where the primary "gains" would be executive aggrandizement or the satiation of popular passion. These checks were intended to insure that the fighting would be supported by most Americans, thus avoiding disastrous internecine struggle within the country over war policy.

¹³⁹ The Framers initially intended to grant Congress the power "to make" war, as opposed to declaring it. In due course, however, "Mr. M[adison] and Mr. Gerry moved to insert 'declare,' striking out 'make' war; leaving to the Executive the power to repel sudden attacks." The motion passed, though it had failed upon an earlier vote. *Id.* at 318-19, 313. What precisely those who voted in favor of the change intended is difficult to say in light of existing information, but it does seem clear that the amendment was not even remotely designed to empower the Executive to initiate hostilities. See WORMUTH at 3-4; Note, 81 HARV. L. REV., *supra* note 2, at 1773 n.16. Compare a provision temporarily inserted by the Committee of Style, which stated that "[n]o State, without the consent of the Legislature of the United States shall . . . engage in any war, unless it shall be actually invaded by enemies, or the danger of invasion shall be so imminent, as not to admit of a delay, until the Legislature of the United States can be consulted." II RECORDS 577.

¹⁴⁰ Arguably, under such circumstances constitutional procedures are superceded by an inherent right of the country, as a sovereign state, to protect its territorial integrity against foreign attack. Since the President is generally the citizen most able to galvanize a defensive reaction, he acts. *Language in United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316-18 (1936), lends a measure of judicial support to this contention. See also M. McDUGAL, *supra* note 14, at 496-503; L. SMITH, *AMERICAN DEMOCRACY AND MILITARY POWER* 291-92 (1951); Note, 81 HARV. L. REV., *supra* note 2, at 1778.

¹⁴¹ See notes 41-42, 46-47 *supra* and accompanying text.

¹⁴² "Polk's action set a precedent for also viewing as 'war' the invasion of disputed

is clearly imminent, the Executive need not wait for it to fall. Arguably, the change in world conditions since 1789—the end of our geographical immunity, the revolution in military technology and the new balance of power¹⁴³—permits unilateral executive reaction to a sudden attack on a foreign state deemed essential to our security. Accordingly, a declaration of war by a foreign power of only paper force would not justify unilateral presidential response,¹⁴⁴ but the launching of nuclear weapons aimed at American cities would, even before the missiles reached their targets.¹⁴⁵ Perhaps a sudden assault upon Canada or West Germany would similarly justify immediate executive action.

The President obviously must be the one who determines when a thrust is in progress which justifies his unilateral response.¹⁴⁶ His judgment, however, may be repudiated when the matter is later placed before Congress.¹⁴⁷ Such repudiation, in the face of genuine enemy attack, is most unlikely; virtually all citizens will agree that the survival of the country is worth the price of conflict, and Congress will generally be far more prone to attack a President who fails to defend the nation, than one who responds vigorously.

Defense of the country, however, is not synonymous with offensive action against the attacker, though admittedly there is no clear line

territory claimed under a treaty of annexation." Note, 81 HARV. L. REV., *supra* note 2, at 1781.

¹⁴³ See notes 19-20 *supra* and accompanying text.

¹⁴⁴ For Franklin Roosevelt's response to declarations of war against the United States by Bulgaria, Hungary and Rumania at the outset of American involvement in World War II, see Note, 81 HARV. L. REV., *supra* note 2, at 1781.

¹⁴⁵ The sudden and provocative establishment of offensive weapons by an unfriendly state on the territory of an ally located near the United States might justify immediate preventive action by the President—for example, John Kennedy's response to the Cuban Missile Crisis in 1962.

¹⁴⁶ Absent such presidential discretion, the "sudden attack" exception to the necessity for prior congressional approval of hostilities would become meaningless. The exception assumes that the country is presented with an accomplished fact and with the need to respond before Congress could reasonably be expected to act. Mr. Justice Grier stated in 1863 that

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. . . .

. . . .

This greatest of civil wars was not gradually developed [I]t nevertheless sprung forth suddenly The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.

The Prize Cases, 67 U.S. (2 Black) 635, 668-69 (1863).

¹⁴⁷ See note 48 *supra*.

between the offensive and the defensive. Under the Framers' rationale, rapid response should give way to check and deliberation once the country is secure from the prospect of immediate physical assault.¹⁴⁸ The nature of the Executive's defensive measures will depend upon the nature of the thrust, but at no time should his response be disproportionate to the assault. Should he be responding to a nuclear attack, presumably there would be little or no distinction between defensive and offensive action—the exchange would likely be terminal for both parties. But should enemy submarines shell coastal cities with conventional ordinance, the President need only clear the coasts of enemy ships; the launching of SAC and invasion of the enemy homeland ought to await congressional authorization. In sum, the Executive does not receive full war-time powers simply because another state has directly assaulted American territory.

While the President under the Framers' rationale can always respond to sudden attacks upon United States territory, and arguably upon the

¹⁴⁸ President Jefferson refused to take offensive measures during the First Barbary War until Congress approved them. See note 42 *supra* and accompanying text. Faced with a declaration of war by Tripoli and its attacks on American ships, he stated in his message to Congress of December 8, 1801, that "[u]nauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel [a Tripolitan cruiser which had attacked a United States schooner], being disabled from committing further hostilities was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries." Quoted in E. CORWIN, *supra* note 127, at 132. Alexander Hamilton replied heatedly that "it is the peculiar and exclusive province of Congress, *when the nation is at peace* to change that state into a state of war; . . . in other words, it belongs to Congress *to go to War*. But when a foreign national declares, or openly and avowedly makes war upon the United States, they are then by the very fact already *at war*, and an declaration on the part of Congress is nugatory; it is at least unnecessary." Quoted in *id.* at 134.

One writer understands Hamilton's position to have been that "[a]s long as the United States is not the initial aggressor, the President's actions will remain 'defensive' requiring no further congressional action to enable him to continue to wage the war thrust on the country." Note, 81 HARV. L. REV., *supra* note 2, at 1779-80 (footnote omitted). In other words, once the Executive has beaten off an enemy assault, he then has discretion to take offensive measures. If this was Hamilton's position, it seems to be at odds with that of the Framers; they intended the process of check and deliberation to precede decisions to use force except when force was used to repel sudden attacks.

When the whole of Hamilton's reply is considered, however, his primary complaint appears to have been with Jefferson's bizarre understanding of what constitutes defensive action. See E. CORWIN, *supra* note 127, at 133-35. On this score, the merits are clearly against the President's release of an enemy ship and crew captured in the process of attacking an American vessel. While the Framers did not intend the Executive to take aggressive action on his own initiative, it is not at all plausible that they intended his defensive action to be so potentially self-defeating.

territory of states absolutely vital to our security, the Drafters did not intend unilateral presidential response to threats to American interests or citizens abroad, except under the most modest circumstances. As the constitutional provision granting Congress control over letters of marque and reprisal suggests,¹⁴⁹ the Framers intended "war" to be a broad concept. Judging by early practice, it appears that war in the constitutional sense was deemed to arise when the United States decided to settle a dispute with another state by the use of military force. The Naval War with France, from 1798-1800, involved neither appreciable force nor complete rupture of relations between the combatants; it did, however, require and receive congressional authorization.

Congress must be given an opportunity to say whether it finds the potential gains from the use of force worth the potential losses. The latter may be twofold.¹⁵⁰ First, there are the physical and economic costs, and the diminished legal rights produced by war. Their extent depends upon the scale of the fighting, the enemy's strength, his location and the harm to be inflicted on him. In any use of force today, unlike the nineteenth century, it is difficult to predict the ultimate price. What

¹⁴⁹ WORMUTH at 6, states:

Even before the adoption of the Constitution, American law recognized that it was possible to wage war at different levels. In 1782 the Federal Court of Appeals, the prize court established under the Articles of Confederation, observed: The writers upon the law of nations, speaking of the different kinds of war, distinguish them into perfect and imperfect: A perfect war is that which destroys the national peace and tranquility, and lays the foundation of every possible act of hostility. The imperfect war is that which does not entirely destroy the public tranquility, but interrupts it only in some particulars, as in the case of reprisals.

The framers of the Constitution accepted this conception and assigned the power to initiate both perfect and imperfect war to Congress, which was "To declare war, grant letters of marque and reprisal, and makes rules concerning captures on land and water."

(footnote omitted).

¹⁵⁰ Note, 81 HARV. L. REV., *supra* note 2, at 1775, defines war in the constitutional sense as having a "quantitative" and a "qualitative" aspect:

There are two possible reasons for requiring [approval of hostilities] from the body most directly representative of popular sentiment. The first is that such a decision involves a risk of great economic and physical sacrifice not to be incurred without such approval. The second is that even in cases where no significant physical effort is likely to be required . . . the very act of using force against a foreign sovereign entails moral and legal consequences sufficiently significant to require an expression of popular approval. . . . The first argues for a definition phrased in quantitative terms, which would require congressional action prior to engaging in "major" hostilities above a certain level of intensity. The second would result in a more comprehensive, qualitative definition which would forbid any use of force against a foreign sovereign without prior congressional approval.

(footnote omitted).

is initially intended to be a minor effort, perhaps involving only a bloodless show of force, can easily grow into a major war, even a nuclear one. Moreover, the world is today so interrelated and interdependent in economic, ideological and security matters that any use of force is likely to have repercussions which cannot be reliably charted in advance.

Second, there are the political and moral costs and the potential legal sanctions entailed in using force against another state. Since World War I there has been a steady move toward the complete outlawing of the use of force by international disputants, except in self-defense. Heightened respect for national independence and self-determination had led to the prohibition of one state's intervention in another's affairs and to emphasis on collective control over armed enforcement of international law—with an accompanying distaste for unilateral police action. Thus, many armed activities which would have been acceptable under nineteenth century standards of legality and morality are unacceptable today.¹⁵¹ Accordingly, even if a contemporary use of force to protect American interests involved little fighting, it might be costly in terms of its violation of international political sensibilities, law and morality.¹⁵² Whether the cost is justifiable is a decision in which Congress should have a voice.

Congressional authorization need not be by formal declaration of war: “[N]either in the language of the Constitution, the intent of the framers, the available historical and judicial precedents nor the purposes behind the clause” is there a requirement for such formality,¹⁵³ particularly under present circumstances when most wars are deliberately limited in scope and purpose.¹⁵⁴ A joint resolution, signed

¹⁵¹ The landing of military units in backward states to protect American property or citizens, though common in the nineteenth century, would be acceptable today—if at all—only in situations in which public order has wholly collapsed, with great resulting danger to United States citizens; American property would have to suffer unaided. Similarly, armed reprisals against states delinquent in their adherence to international law, though common in the 1800's, are precluded today in favor of peaceful means of dispute resolution. See note 9 *supra*.

¹⁵² So Senator William Fulbright characterized the 1965 American use of force in the Dominican Republic. 111 CONG. REC. 28374-79 (1965).

¹⁵³ Note, 81 HARV. L. REV., *supra* note 2, at 1802.

¹⁵⁴ Although formal declarations of war are effective devices for rallying support on the home front, empowering the Government to take all necessary emergency measures and serving notice on the enemy and all the world that our goal is conquest, [t]here are . . . numerous policy arguments why the formal declaration of war is undesirable under present circumstances. Arguments made include increased danger of misunderstanding of limited objectives, diplomatic embarrassment in

by the President, is the most tenable method of authorizing the use of force today.¹⁵⁵ To be meaningful, the resolution should be passed only after Congress is aware of the basic elements of the situation, and has had reasonable time to consider their implications. The resolution should not, as a rule, be a blank check leaving the place, purpose and duration of hostilities to the President's sole discretion. To be realistic, however, the resolution must leave the Executive wide discretion to respond to changing circumstances. If the legislators wish to delegate full responsibility to the President, it appears that such action would be within the constitutional pale so long as Congress delegates with full awareness of the authority granted.¹⁵⁶

Since the Constitution was ratified, there have been countless manifestations of expectations that decisions to initiate the use of military force abroad must meaningfully involve the legislators. Presidents prior to 1900 generally held such expectations themselves and acted accordingly, and twentieth century Executives prior to the Cold War frequently gave the concept verbal support, though their conduct often belied their words.¹⁵⁷ Many members of Congress, particularly in

recognition of nonrecognized . . . opponents, inhibition of settlement possibilities, the danger of widening the war, and unnecessarily increasing a President's domestic authority. Although each of these arguments has . . . merit, probably the most compelling reason for not using a formal declaration . . . is that there is no reason to do so. As former Secretary of Defense McNamara has pointed out "[T]here has not been a formal declaration of war—anywhere in the world—since World War II."

Moore, *supra* note 2, at 33 (footnote omitted).

¹⁵⁵ Senate approval of a treaty would not suffice, as that would exclude the House from the decision-making process. An executive agreement, approved by the entire Congress and specifically described as authorization to use force, should be acceptable. Similarly, legislation to increase the size of the armed forces or to appropriate additional money to sustain a use of force might be regarded as authorization if legislative intent to that effect is made abundantly clear. Absent such clarity, simple legislation ought not to be regarded as implied approval, since it may have been adopted for reasons other than to ratify a presidential *fait accompli*. See note 21 *supra* and accompanying text. Nothing can be assumed from a congressional failure to act. The burden is not upon Congress to make its views clear or be deemed to have acquiesced, but rather upon the President to obtain legislative approval before he acts. See E. CORWIN, *supra* note 39, at 152-53; WORMUTH at 33; Velvel, *supra* note 2, at 455-56, 465-68; Note, 81 HARV. L. REV., *supra* note 2, at 1798-1803.

¹⁵⁶ The extent to which Congress may constitutionally delegate its war power to the President has been a matter of some controversy in the past. In the wake of *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), however, it seems unlikely that strict anti-delegation rules apply in the foreign context. See Moore, *supra* note 2, at 34. But see WORMUTH at 43-58.

¹⁵⁷ See E. CORWIN, *supra* note 14, at 201-02. See the collection of presidential statements in Putney, *supra* note 49, at 6-30.

the Senate, and much of the general public retain a view that the Constitution requires congressional involvement in decisions to initiate conflict abroad.

Constitutional argument in favor of the present high state of presidential prerogative has, as a rule, not frontally attacked these expectations. Rather, doctrinal justification for presidential practice, when offered, has tended to ignore the constitutional grants to Congress¹⁵⁸ and to read expansively the complementary provisions applicable to the Executive. The broad interpretation has been dictated, it is said, by the demands of national security. Accordingly, the President's powers have been rolled into one ill-defined, mutually supportive bundle and used to justify presidential authority to do virtually "anything, anywhere, that can be done with an army or navy."¹⁵⁹

¹⁵⁸ A notable exception has been the expansive reading of the "sudden attack" exception. One writer argues that in the event of a direct attack, the President need not obtain prior congressional approval, even though he has sufficient time to do so. Significantly, however, in instances cited for support—First Barbary, Mexican and Civil Wars—authorization was sought and received concurrently with or immediately after the President's action. Note, 81 HARV. L. REV., *supra* note 2, at 1779-81, 1783, 1784 n.69. With regard to the place of the attack, a good case can be made that under present conditions, the enemy activity need not directly affect United States territory, if it poses a threat to American territorial integrity. Compare *id.* at 1782-85, with Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345, 359-65 (1955). Finally, regarding the nature of the presidential response, it has been argued, particularly in the wake of the Prize Cases, 67 U.S. (2 Black) 635 (1863), that the President possesses full power to conduct the hostilities as he sees fit, once war is thrust upon the United States. Under this view it becomes important to determine when an enemy assault constitutes "war," lest presidential powers be unleashed too readily. See Note, 81 HARV. L. REV., *supra*, at 1778-82. But as contended earlier, see note 148 *supra* and accompanying text, it does not appear that the President receives unilateral authority to do more than stifle an enemy attack. If such is the case, there is no need to haggle over when an attack is and when it is not war," since the President never enjoys unilateral authority to escalate the conflict.

¹⁵⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641-42 (1952) (Jackson, J., concurring); see Velvel, *supra* note 2, at 453-72.

The President as the enforcer of the law is deemed to have constitutional authority to implement treaties, international law and the basic foreign policy objectives of the United States. See, e.g., E. CORWIN, *supra* note 14, at 194-204; E. CORWIN, *supra* note 127, at 142-63; M. McDUGAL, *supra* note 14, at 487; 3 W. WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 1567 (2d ed. 1929); Banks, *Steel, Sawyer, and the Executive Power*, 14 U. PITT. L. REV. 467, 506-16 (1953); Mathews, *supra* note 158, at 350-61, 363-65, 366-69; Note, 81 HARV. L. REV., *supra* note 2, at 1776-77, 1787-94. The President's constitutional role as the country's foremost diplomat has been read to include control over both the conduct and the shaping of our foreign relations. See, e.g., the discussion in AMERICAN HERITAGE, *supra* note 13, at 276-78; E. CORWIN, *supra* note 14, at 170-226; E. CORWIN, *supra* note 127, at 1-32; M. McDUGAL, *supra* note 14, at 435-41, 487-92, 557-60; C. ROSSITER, *supra* note 21, at 90-91; Foley, *Some Aspects of*

THE PRESENT CONSTITUTIONAL BALANCE BETWEEN PRESIDENT AND CONGRESS

Constitutional law is most certain when peoples' expectations about the nature of constitutional behavior are actually realized in the conduct of public affairs¹⁶⁰—when the constitutional rules governing the President's use of force abroad are given effect. Without such realization in practice, rule-based expectations about the scope of presidential authority are quixotic; without adherence to the rules, the Executive's practice is simply the illegitimate exercise of power. As suggested,¹⁶¹ the ultimate goal of constitutional interpretation is constitutional law—both rule and practice—which serves the long-term best interests of the country. Thus, it is ill-advised to promote constitutional rules whose implementation would not meet contemporary needs, just as it is ill-advised to promote practices which needlessly flout the rules.

The previous discussion has demonstrated that practice with regard to the use of American troops abroad has been varied. Certainly, however, presidential action immediately before the two World Wars and during the last twenty-five years provides precedent for plenary executive control. The factors which have seemed to necessitate this practice, and its existence over a significant period of time, have naturally broadened expectations about the scope of the President's authority. It is doubtful, however, that most people now believe that

the Constitutional Powers of the President, 27 A.B.A.J. 485, 487-88 (1941); Mathews, *supra* note 158, at 362-63, 366, 369-70; Morgenthau, *supra* note 11, at 264-65; Note, 81 HARV. L. REV., *supra* note 2, at 1777-78. As Commander-in-Chief, the Executive has constitutional authority to do whatever he feels necessary for the defense of the country. See, e.g., the analysis in E. CORWIN, *supra* note 14, at 227-62; M. McDUGAL, *supra* note 14, at 485-87; C. ROSSITER, *supra* note 21, at 24-25; W. WILLOUGHBY, *supra*, at 1567-68; Foley, *supra*, at 485-87; Jones, *The President, Congress, and Foreign Relations*, 29 CALIF. L. REV. 565, 575-83 (1941); Mathews, *supra* note 158, at 352-65. The fact that he holds the executive power has been treated as confirmation of his plenary authority over foreign affairs; if his enumerated powers are found wanting in constitutional weight, his inherent authority as Chief Executive is thought to flesh them out as required. See, e.g., E. CORWIN, *supra* note 14, at 3-16, 147-58; M. McDUGAL, *supra* note 14, at 487-92; C. ROSSITER, *supra* note 21, at 36, 78-79, 147, 259; C. ROSSITER, *supra* note 100, at 65-77; J. SMITH & C. COTTER, *POWERS OF THE PRESIDENT DURING CRISES* 4-13, 125-46 (1960); W. WILLOUGHBY, *supra*, at 1567-68; Banks, *supra*, at 499-502, 516-22; CORWIN, *The Steel Seizure Case: A Judicial Brick without Straw*, 53 COLUM. L. REV. 53 (1953); Foley, *supra*, at 485, 488-90; Gibson, *The President's Inherent Emergency Powers*, 12 FED. B.J. 107 (1951); Jones, *supra* at 565-67, 575-83; Mathews, *supra* note 158, at 381-85; Note, 81 HARV. L. REV., *supra* note 2, at 1775-76, 1792-94.

¹⁶⁰ See notes 27, 29-31 *supra* and accompanying text.

¹⁶¹ See note 23 *supra* and accompanying text.

the President is entitled to initiate foreign wars *sua sponte*. The general public takes a relatively blackletter view of the Constitution,¹⁶² and unless there is pressing need for its amendment, popular understanding of the rule of law dictates adherence to provisions whose language and initial intent seem clear. The power vested in Congress to declare war is a primal instance of such a provision. Even the strongest supporters of presidential prerogative would likely prefer to have congressional approval of American involvement in foreign war—if only they were confident that Congress would vote wisely. Accordingly, it is important to determine whether the present degree of presidential control over the use of force abroad is essential to long-term national interests, and is therefore the constitutional order that must prevail irrespective of countervailing expectations.

The primary argument for sanctification of present practice centers on past congressional inability to cope with questions of foreign policy, particularly those concerned with the use of force.¹⁶³ Fault can be found with the congressional decision-making process; it is too uninformed and inexperienced, too indecisive and inflexible, overly public, almost always too slow and sometimes out-of-session when crises arise. There is also grave doubt as to the wisdom of the policies that would be generated even by a smoothly functioning legislative decisional process, particularly in light of the disastrous congressional approach to foreign affairs between World Wars.

The factors behind the contemporary strength of the presidency, noted above,¹⁶⁴ are relevant to the question whether Congress might regain some of its lost influence over foreign affairs without harm to national security. Thus, inquiry must determine the extent to which the present balance of power has resulted from the tendency of both Congress and the Executive to follow the path of least resistance, carried along by the interplay of their institutional characteristics and certain historical forces, and whether it exists because national security requires presidential hegemony. The more the latter is the case, the more any rules requiring meaningful congressional participation in decisions to use force abroad should be discarded. Conversely, the more

¹⁶² See notes 28-31 *supra* and accompanying text. Opposition to presidential policies in Vietnam has undoubtedly played a part in rekindling expectations that Congress is constitutionally entitled to a meaningful voice in American decisions to go to war. See note 78 *supra*.

¹⁶³ See notes 77-80 *supra* and accompanying text.

¹⁶⁴ See note 80 *supra* and accompanying text.

presidential practice appears needlessly to have diverged from the rules, the greater the need for strenuous effort to bring it back into line.

At the outset, it must be readily admitted that no easy distinctions can be made between the path of least resistance and the security interests of the nation. Once any practice has developed in a reasonably efficient manner, any change will involve the costs of establishing new patterns and will risk the creation of a less viable order. The latter possibility is of particular concern in the present context.

Of the historical forces contributing to the existing allocation of power between the President and Congress, none has been more important than the increased pace, complexity and danger of the times. The President, who singly holds his office, who has unsurpassed access to information and experts, and who is always on the job, has been more able to meet current demands than has Congress, with its many men in office, inferior access to information and experts, and frequent inability to assemble its members quickly. It has been suggested that for these reasons Congress is inherently incapable of participating effectively in decisions regarding the use of troops abroad.

Such is not necessarily the case. To the extent that Congress' problem is its indecisive, inflexible, slow and noncontinuous decision-making process, improvement is possible. Legislators need to decide to act and to do so with reasonable dispatch. They need to restructure procedures such as the seniority system which now serve to clog debate and decision. When speed is of the essence,¹⁶⁵ the President can respond and then place the issue before Congress. It is questionable, however, that great speed is required in most decisions regarding the use of force. With the possible exceptions of Korea and the Cuban Missile Crisis, its necessity during the last twenty-five years has been exaggerated. Even in the Korean situation, congressional authorization could have been obtained since Congress was in session and the legislators are capable of rapid action when confronted with an act such as the North Korean invasion. In the Cuban situation, the President's reluctance to involve Congress appears to have been a fear of exposing the nature of the American response before it could be sprung full-blown on the unsuspecting Soviets, rather than a lack of time.

To the extent that Congress' problem stems from its inability to operate secretly, a defect precluding access to certain information and participation in highly sensitive decisions, existing procedures for exec-

¹⁶⁵ See note 140 *supra* and accompanying text and note 158 *supra*.

utive session could be further developed. The inclusion of legislators in selected secret decisions, on the assumption that national secrets would not be divulged, is not without precedent.¹⁶⁶ If secrets were in fact divulged, the practice could be abandoned. In situations such as the Cuban Missile Crisis, where it is felt that initial planning must take place while maintaining an outward appearance of normality, the President can either involve congressional leaders in the decision under a procedure previously established by Congress, or simply make the decision unilaterally and present it to Congress for approval after the need for secrecy had passed.

Cuban Missile Crises are rare. The secrecy argument usually arises in the context of classified information. Even were such data not available to the legislators, it is questionable that their ability to make basic foreign policy decisions would be materially impaired. Information is frequently deemed secret by the executive branch for reasons other than its inherent nature, and it has been suggested that ninety-five percent of the data needed to make an informed decision on most foreign policy issues can be found in *The New York Times*.¹⁶⁷

Similarly, it is debatable that experts must make the basic decisions regarding the initiation of hostilities. The determination that military action is in our national interests requires the setting of priorities in light of existing values. It is largely a political decision, and thus arguably less susceptible to resolution by diplomatic and military experts than by politicians, although experts and relevant information are important to insure that the political decision-maker sees and understands the various alternatives and their probable consequences. Information and expertise are already available in the military and foreign relations committees of both houses. Cooperation of the executive branch would also be required, particularly regarding access to classified data. Once adequately buttressed by information and experts, Congress would be better prepared to make rapid, wise decisions and to avoid inundation and intimidation by the torrent of data and expert opinions flowing from the executive branch.

¹⁶⁶ See Note, 81 HARV. L. REV., *supra* note 2, at 1797 n.143.

¹⁶⁷ As one who has had the opportunity to read . . . [top secret] cables at various times in my life, I can testify that 95 per cent of the information essential for intelligent judgement is available to any careful reader of *The New York Times*. . . . Secrecy in diplomatic communication is mostly required to protect negotiating strategies, techniques of intelligence collection, details of weaponry, and gossip about personalities. . . . The myth of inside information has always been used to prevent democratic control of foreign policy

¹⁶⁸ See Singer, *supra* note 60, at 61-62.

A second historical force behind the power of the President has been the development of communication devices which permit direct contact between government officials and the electorate, and which the Chief Executive, as the most active, intelligible branch of government, has been able to exploit in an unsurpassed manner. Though Congress will never be able to compete with the President in manipulating the media to mold public opinion, it could greatly improve its present efforts. Whereas the President assiduously sees to his public image, Congress rarely employs professional image cultivators and seldom works to appear concerned and competent to deal with national problems.¹⁶⁸ Accordingly, the legislators' collective image tends to be one of a parochial and inefficient group, unduly concerned with trivia and self-interest, an image which could be dispelled in part by the use of professional public relations techniques and, more basically, by a willingness to grapple effectively with the country's problems.

Committee hearings are one area in which the legislators could use the media to greatest advantage, as the 1967 Fulbright proceedings indicate. But before committee efforts can have their maximum political and educational effect, they must be purged of the witchhunt aura imparted by past abuses. Responsible and civilized conduct of all committee proceedings would go far toward this end.¹⁶⁹

A third force behind presidential aggrandizement has been the democratization of politics in this country, rewarding the branch of government which seemed most representative of all the people and thus most concerned with the welfare of the nation. It may be argued that since the President represents all the people, he is entitled to rule by plebiscite, appealing directly to the public for support, and regarding the legislature as a necessary evil. But such a view is compelling only if Congress is in fact an undemocratic body—as it was when malapportioned districts, excessive obeisance to the seniority system and undue devotion to local, special and personal interests were at their peak.¹⁷⁰ Reapportionment, a move toward younger leadership and a

¹⁶⁸ See Kurland, *supra* note 2, at 635.

¹⁶⁹ See *id.* at 633.

¹⁷⁰ Congress was possibly at its lowest ebb as a representative body of the national interest at the turn of the century. See AMERICAN HERITAGE, *supra* note 13, at 270-71. The Editors of *American Heritage* conclude that, over the long term,

[i]f decisive leadership had been lacking in the White House, the United States might have become another sort of country, and an inferior one, pervaded by the spirit of what Emerson termed "village littleness." This is the spirit that infuses many of the activities (or inactivities) of Congress at its narrowest. It

growing concern with national problems preclude a dismissal of Congress on these grounds today.¹⁷¹ Individual congressmen will always be somewhat more parochial than the President, as is appropriate for men who are the representatives of a part rather than the whole of the national electorate.

A corollary of the plebiscite view holds that the President alone possesses the willpower to make the hard decisions required for a practical foreign policy,¹⁷² and that he alone is capable of persuading a reluctant electorate to support them. Congress, out of both a predilection for

is expressed in such legislative slogans as To get along, go along (go along, that is, with the rest) and Vote your district first.

Id. at 372.

¹⁷¹ Since all states, regardless of their population, have two representatives in the Senate, presumably it can be argued that the upper house *institutionally* will always be less representative than the President. See Morgenthau, *supra* note 11, at 268. It is doubtful, however, that Senators from small states are necessarily less responsive to national sentiment than their colleagues from large states.

¹⁷² Dependence upon the President for an intelligent approach to the world is necessitated, it is said, by the failings of untutored public opinion. The point is worth developing in some detail, as it accounts for much of the fear of involving the people, via their representatives in Congress, too extensively in foreign policy decision-making. Morgenthau, *supra* note 11, at 261, argues that

there exists an inevitable incompatibility between the requirements of good foreign policy and the preferences of a democratically controlled public opinion. As de Tocqueville wrote with special reference to the United States, "Foreign politics demand scarcely any of the qualities which are peculiar to a democracy; they require, on the contrary, the perfect use of almost all those in which it is deficient . . . [A] democracy can only with great difficulties regulate the details of an important undertaking, persevere in a fixed design, and work out its execution in spite of serious obstacles. It cannot combine its measures with secrecy or wait their consequences with patience." The history of foreign policy conducted under democratic conditions illustrates the truth of these observations.

W. LIPPMANN, *ESSAYS IN THE PUBLIC PHILOSOPHY* 19-20 (1955), elaborates upon this theme:

Experience since 1917 indicates that in matters of war and peace the popular answer in the democracies is likely to be No. . . . The rule to which there are few exceptions—the acceptance of the Marshall Plan is one of them—is that at critical junctures, when the stakes are high, the prevailing mass opinion will impose what amounts to a veto upon changing the course on which the government is at the time proceeding. Prepare for war in time of peace? No. It is bad to raise taxes, to unbalance the budget, to take men away from their schools or their jobs, to provoke the enemy. Intervene in a developing conflict? No. Avoid the risk of war. Withdraw from the area of conflict? No. The adversary must not be appeased. Reduce your claims on the area? No. Righteousness cannot be compromised. Negotiate a compromise peace as soon as the opportunity presents itself? No. The aggressor must be punished. Remain armed to enforce the dictated settlement? No. The war is over.

The unhappy truth is that the prevailing public opinion has been destructively wrong at the critical junctures.

See also, e.g., J. SPANIER, *AMERICAN FOREIGN POLICY SINCE WORLD WAR II* 216, 256-57 (rev. ed. 1960).

the status quo and a fear of offending constituents, is said not to represent the true spirit of the nation, and to pose a negative force which the President must overcome.¹⁷³ Though admittedly the Executive is often more willing to make hard decisions than Congress, there is strong reason to believe that on most occasions the President could persuade the legislators, as well as the electorate, to support wise policies. During the Cold War Congress has shown itself quite receptive to presidential leadership in foreign affairs. Moreover, to eliminate Congress as a participant in the shaping of foreign policy removes the country's first line of defense against an Executive who is incapable of making sound decisions.

Yet another variant of the foregoing view treats Congress with more respect. The legislators are not dismissed as undemocratic or spineless; rather their opinions, like those of the people at large, are said to rest within the presidential bosom. Of all men, the President is deemed the best informed concerning popular and congressional opinion.¹⁷⁴ Thus, when he acts, he does so with an awareness of what Congress would very probably have done had it been given the opportunity. But the extent to which this happy state obtains, of course, depends upon the President—upon the caliber of his intelligence-gathering machinery, upon the degree of his receptiveness to views other than his own, upon his ability to understand information at his disposal. And much depends upon the extent to which the President is willing to bow to what he understands to be the will of Congress and the country; even certain knowledge of congressional opinion provides far less a check on a determined President than would the necessity of seeking formal congressional approval.

A fourth factor in the rise of the presidency has been the election of many men who have worked to enlarge the scope of their powers and

¹⁷³ See Morgenthau, *supra* note 11, at 267-68. See note 170 *supra*.

¹⁷⁴ A. SCHLESINGER, *supra* note 13, at 187-88, states:

I would say that any President incorporates, in a sense, a deep awareness of the probable congressional reactions. I think one of the great myths of the presidency is that the President is the most lonely man in the world. The fact is that no one sees more people or is exposed to a wider range of opinion or has imaginatively to expose himself to a wider hypothetical range of opinion than the President He is not the loneliest man in the world. He knows more, he is aware of more and he is aware of more possibilities and more probable reactions and objections than anyone else. And the President knows that he has to incorporate in himself a sense of all this if what he does is going to be accepted. So the fact that this is technically a decision of his own doesn't mean that in practice that these considerations of what other people feel or the Congress feels or the country feels are excluded from his processes in making that decision.

responsibilities. It is at this point that serious doubts arise as to the capacity of Congress to reverse the trend toward executive domination of foreign affairs. Though the legislators still have the power to force even a reluctant President to consult Congress about the employment of force abroad,¹⁷⁵ a majority of them may well choose not to assert it. Much of the leadership would oppose for reasons of personal power the changes in the decision-making process that would be required. Some legislators at any time will approve of the President's policies and be unwilling to think in institutional terms.¹⁷⁶ Some perhaps would fear that realistic procedures for congressional involvement in such crucial decisions could not be fashioned. Some will always prefer to avoid having to make such politically explosive decisions, and virtually all would be hard pressed to find the time to make the effort to reestablish and then sustain a congressional voice in foreign policy decisions. The tendency, accordingly, will be to make a few noises about executive usurpation without really disturbing the status quo.¹⁷⁷

Should Congress not have the will to reassert itself, the fifth factor behind the President's rise, momentum, will continue to inure solely to his advantage. But should the legislators prove themselves capable of acting, and acting wisely, momentum may serve them also. Successful congressional involvement in one decision regarding the use of force would lead to greater opportunities for future participation as public and presidential confidence in Congress grew, as well as the legislators' confidence in themselves.

In sum, the President's control over decisions to use force abroad is a perfectly natural and explicable development, but it is not one inexorably necessitated by national self-interest. This is not to say that the President should surrender his power over the day-to-day conduct of foreign relations or relinquish his role as a forceful external leader. It is to say that Congress is capable of having a voice in shaping foreign policies and a decisive voice on whether the United States will

¹⁷⁵ See text at notes 90-99 *supra*.

¹⁷⁶ There are certain institutional interests which put the Congress as a whole against the presidency. But I think, that despite this, many people in Congress believe in and support the program of the President if he is of their party.

A. SCHLESINGER, *supra* note 13, at 162. See Kurland's conclusion that Americans are extremely result-oriented at note 78 *supra*.

¹⁷⁷ For example, the "Great Debate" over the President's authority to send troops to Korea and Western Europe, which raged for three months in early 1951 under the impetus of Senator Robert A. Taft, ultimately came to naught. See note 57 *supra*.

initiate the use of force abroad.¹⁷⁸ To have this influence, Congress would have to alter its institutional framework, but not radically. The primary transformation would have to be in willpower. Lacking to date has been both the will to make the structural changes essential to a systematic, informed voice in foreign affairs, and the will to use existing powers¹⁷⁹ to persuade an unconvinced President to seek meaningful congressional approval before initiating foreign conflict.¹⁸⁰

Congressional participation in these decisions would not guarantee more peaceful foreign policies, though it should not lead to more conflict. It is difficult for Congress to fight a war through a reluctant President. Nor would congressional involvement ensure wise policies, as the legislators' myopia during the twenties and thirties indicates. Should Congress take stands that the President found in error on vital

¹⁷⁸ W. LIPPMANN, *supra* note 172, at 30, suggests the executive-legislative relationship that should prevail:

The executive is the active power in the state, the asking and the proposing power. The representative assembly is the consenting power, the petitioning, the approving and the criticizing, the accepting and the refusing power. The two powers are necessary if there is to be order and freedom. But each must be true to its own nature, each limiting and complementing the other. The government must be able to govern and the citizens must be represented in order that they shall not be oppressed. The health of the system depends upon the relationship of the two powers. If either absorbs or destroys the functions of the other power, the constitution is deranged.

¹⁷⁹ It has been suggested that Congress, like the malapportioned plaintiffs in *Baker v. Carr*, 369 U.S. 186 (1962), can do very little to help themselves. Schwartz, *supra* note 2, at 1047, states:

It is claimed that the action that is under attack has circumvented the very political process that the framers of the Constitution intended as a check on the President's power to commit American forces to combat. Thus, unless it is established through the courts that Congress has an indispensable role to play, the political branch can never perform its intended function.

This situation, then, is much like the one in *Baker v. Carr*. There the decision in allocating power within the state was, as perhaps is the decision to commit troops to combat, political in the profoundest sense. But it became clear that despite the wide range of reasonable choice that might be open to state legislatures, apportionment was not being carried out under any rational standard but rather was being used simply to perpetuate the existing power structure. It thus became necessary for the Court to impose rationality in order to restore the very integrity of the political process.

It seems, however, that the situations of the *Baker* plaintiffs and Congress are significantly different. No amount of will power on the part of the former could have effected reapportionment of legislatures controlled by men from overrepresented districts. Congress, on the other hand, is perfectly capable *itself* of pressing the President into cooperation, *if* it chooses to do so.

¹⁸⁰ Since few Presidents are unaware that they are strongest when supported by Congress, and hamstrung when opposed, they are likely to bow with notable grace to congressional insistence on a role in shaping foreign policy—so long as the relationship remains that described by Lippmann, *supra* note 178, and so long as the legislators make their decisions in terms of their understanding of the national interest.

matters, however, he would probably do as Woodrow Wilson and Franklin Roosevelt did. No branch of government will ever find its powers respected if it insists on taking positions that do not respond to contemporary realities.

Congressional participation would have one clear benefit. It would add legitimacy to the use of American troops abroad. The Constitution as popularly understood would be heeded, with substantial gains for the rule of law.¹⁸¹ Moreover, a congressionally authorized conflict would receive greater public backing than would presidentially authorized hostilities. Such political support is crucial in modern limited wars, which are more easily lost in domestic politics than on foreign battlefields. Of course, it is also possible that congressional involvement in the decision-making could lead to wiser policies; the mere process of articulating and debating goals and strategies might lead all concerned to a fuller understanding of the interests and alternatives at stake. It bears reiteration that the articulation and debate, if it is to be meaningful, must begin with the shaping of the policies that lead to the need to consider the use of force, and not with the actual determination whether to fight.

UNILATERAL EXECUTIVE WAR POWERS IN OUTLINE

Even with meaningful congressional participation in foreign affairs decision-making, it seems that independent executive power over the use of force would remain in at least five areas.

First. The President would doubtless continue to be the primary initiating force in American foreign relations.¹⁸² He would structure our policies and present them to Congress for its advice and consent. In most instances, Congress would very likely accept and follow his guidance. He would retain his control over the recognition of states and governments and over the conduct and maintenance of diplomatic intercourse—each potentially important to questions of war and peace. Even when working under a meaningful congressional war resolution—one specifying the time, place and purpose of the use of force—his powers as Commander-in-Chief over strategy, tactics and weapons, and his control over negotiations with the enemy, allies and other states would have great impact upon the nature of the conflict.

Second. The President could respond unilaterally to direct, physical

¹⁸¹ See notes 29-31 *supra* and accompanying text.

¹⁸² See note 178 *supra* and accompanying text.

assaults upon the territory of the United States or its possessions. The blow need not have actually fallen before he initiates defensive measures, if the attack appears to be imminent and inevitable. The presidential response, however, should be proportionate to the assault, sufficient only to repel the attackers and to ensure that they lack the immediate capacity to strike again. Before proceeding beyond such defensive measures, the President should seek the authorization of Congress.¹⁸³ Though no reasonable congressman would oppose defense of American territorial integrity, once an attack is repelled many legislators might wish to limit in some manner the means taken to resolve the hostilities so commenced.

Third. American citizens or military units under sudden attack abroad can, of course, defend themselves to the best of their ability. When the attack takes place in international territory, air or sea, the situation becomes closely analogous to an assault on American territory, and the President could take all steps necessary to stifle the attack. He might, for example, have resisted with all available force recent North Korean attacks on American reconnaissance units.

But when the attack occurs within the territory of another state, he should use force to defend the besieged only if his action is unlikely to risk the initiation of substantial hostilities, and only if it does not involve battle with the troops of the state in question, as opposed to battle with individuals not under its control.¹⁸⁴ The joint 1965 effort by the United States and Belgium to rescue whites trapped by rebellious elements in the Congo seems to have been a prime instance of constitutional rescue action by the President. An attempt to recover the *Pueblo* and its crew, once they were forced into port, however, would have risked renewal of the Korean War and almost surely would have involved a pitched battle with North Korean forces; thus, the venture would have required congressional authorization. Military reprisals

¹⁸³ For example, in the event of conventional shelling of coastal cities by foreign submarines, the President could clear coastal waters of enemy ships. An attack on the enemy homeland, however, should await congressional approval.

¹⁸⁴ When such individuals become disciplined insurgents who control appreciable territory, rather than a mob or ill-organized rebels, they should be treated as the forces of a *de facto* state for purposes of judging the appropriateness of presidential action against them. Moreover, special considerations become applicable when forces under the control of one country oppose United States presence in a third country. If such forces are irregular, and escalation of the conflict is unlikely, presidential action may be permissible. On the other hand, where intervention is likely to lead to increased hostilities, congressional involvement is mandatory.

against another state to avenge its attacks upon American citizens or troops should always have prior congressional approval.

Should the President conclude that an immediate response is essential, he could act and simultaneously go to Congress with his recommendations. Presumably the President could make the strongest case for immediate response when he is able to act effectively while the attack is yet in progress; upon its completion, there would generally be less cause for haste.¹⁸⁵ Similarly, should the President determine that secrecy is essential to a successful response, he could delay his submission of the matter to Congress.

Fourth. The President could respond unilaterally to attacks on American security interests abroad if he concludes that no delay can be brooked or if he feels that absolute secrecy in the initial planning and execution of the American response is essential. He must, however, inform Congress as soon as feasible, seeking ratification for the steps taken and authorization for future action. During the Korean invasion, arguably there was cause for unilateral presidential response in the interests of speed, and during the Cuban Missile Crisis in the interests of secrecy. Vietnam at no point required unilateral executive action on these grounds. Attacks on American destroyers in the Tonkin Gulf fell within category three above. As noted there, the President could take all necessary measures to repel the assaults, but he could not use them to justify his initiation of further hostilities.

Fifth. The President could deploy American forces, intelligence missions, military aid and advisers, although he should attempt in good faith to prevent their use in an offensive or provocative manner without congressional blessing. The prewar activities of Presidents Wilson and Roosevelt clearly violated this canon, but particularly in Roosevelt's case it is difficult to fault his action, considering the low ebb of congressional wisdom. It is well to reiterate a point made earlier: Neither Congress, nor for that matter the President, will find that

¹⁸⁵ Delay until congressional authorization might preclude action until the attack had been consummated and the need for defensive measures mooted. Moreover, the attacking state is less likely to regard as provocative steps taken to repel its assault, as opposed to the initiation of force against it in a rescue attempt or retaliatory raid. It seems, for example, that the United States could have recaptured the *Pueblo* even after it entered North Korean territorial waters, en route to captivity, with less risk of leading the attackers to take additional, unrelated military action (for example, invasion of South Korea) than would have been the case had Washington, at some later date, staged reprisal raids or attempted to rescue the ship and its crew.

their constitutional powers remain intact if their policies are dangerously ill-advised.

As in Vietnam, the commitment of military advisers can grow to something far more than originally envisioned, particularly when the government aided is battling indigenous insurgents who have external backing. At some point during the American buildup, specific congressional authorization for the use of force should be sought. Perhaps the logical moment would be before the introduction of regular American units for probable combat use.¹⁸⁶

CONCLUSION

To recapitulate, the goal here has been a brief development of factors bearing on the scope of the President's constitutional authority to commit American forces to foreign conflict. If realistic limits are to be placed on his use of the military abroad, it seems necessary to lessen presidential hegemony over the shaping of foreign policies which lead to the need to use armed forces, as well as over actual military deployment. The extent of the President's constitutional prerogative in these areas, however, is not easily ascertained.

As a matter of practice, presidential control has moved unevenly along a continuum, ranging from collaboration with and deference to Congress in the early years of the Republic, to the presidential *faits accomplis* of the Cold War. But even today there remain both internal and external restraints on the President's use of the military abroad. Not the least of the latter are the powers of Congress, both exercised and latent.

Popular expectations regarding the constitutional uses to which the Executive may put the military have not kept pace with his actual practice. There continue to exist expectations, rooted in the language of the Constitution and in the intent of the Framers, that Congress must have a meaningful voice in decisions to initiate hostilities abroad. A conflict therefore exists between expectations and practice. Some shift in one or the other, or both, is necessary if constitutional law is to obtain. The resolution should be one that results in that pattern of expectations, realized in practice, which best serves the long-term interests of the country.

To this end, it appears that change should occur largely in the practice of the last twenty-five years. The present high state of presi-

¹⁸⁶ See Moore, *supra* note 2, at 32.

dential prerogative has evolved naturally out of a set of historical and institutional factors which enabled the President to respond to contemporary pressures more easily than Congress. If Congress has the will, however, it too can meet the demands of modern foreign policy decision-making. While certain changes in institutional structure will be necessary, the critical factor will be the development of a congressional willingness to act quickly and wisely on vital issues and to use its existing powers to make its influence felt.

It is sometimes suggested that claims of undue presidential aggrandizement are pointless, since restraints exist which can hamstring executive policies. Thus, it is said, leave all to the political process: If the President is a usurper, he will be struck down in good time. The reality ignored, however, is that peoples' conduct is very much influenced by what they believe they have an obligation to do. In so sensitive an area as national security, the natural tendency will be to leave matters as they stand, since the existing order is, after all, tenable, if not clearly constitutional. Accordingly, unless Congress believes that it has a constitutional duty to make its voice felt in these decisions, unless the President believes that he has a constitutional duty to seek and honor congressional views on a systematic basis, and, ultimately, unless the electorate insists on such a relationship between the two branches, presidential hegemony will continue undisturbed, save in those rare instances when executive policies result in lengthy, costly and seemingly fruitless struggles.

THE VIETNAM WAR: THE PRESIDENT VERSUS THE CONSTITUTION

(By Francis D. Wormuth)

CHAPTER IX: RATIFICATION AND DELEGATION BY APPROPRIATION

On February 7, 1965, President Johnson began his air attacks on North Vietnam. Then he began to move substantial bodies of troops into South Vietnam, a commitment which has not reached its end with 525,000 men. It would have been politically imprudent to take these momentous actions without making some gesture toward Congress. On May 4, he asked Congress to appropriate another \$700,000,000 "to meet mounting military requirements in Vietnam."

This is not a routine appropriation. For every Member of Congress who supports this request is also voting to persist in our effort to halt Communist aggression in South Vietnam. Each is saying that the Congress and the President stand united before the world in joint determination that the independence of South Vietnam shall be preserved and Communist attack will not succeed.¹

If President Johnson had sought Congressional support in any other way, it would have been necessary to draft a bill which stated what he was authorized to do. The bill would have gone to the Foreign Relations and Armed Services Committees, and these would have been obliged to review the policy proposed in the bill. They would have canvassed alternatives. The two houses would have debated the concrete recommendations of the President. Congress would have played its constitutional role in the exercise of the war power.

But as it was, Congress left the determination of policy, the question of war and peace, the scope of limited war, the choice between limited war and general war—even the choice of adversary—entirely in the hands of the President, where it had already undertaken to place all these decisions by the Tonkin Gulf Resolution. The only change was that it enlarged his choice by giving him \$700,000,000 to spend in doing whatever he should decide to do.

Nevertheless, an act of Congress was passed. This enabled the State Department in its justificatory memorandum to boast: "The appropriation act constitutes a clear endorsement and approval of the actions taken by the President."²

This suggests that the act was viewed as a ratification of past actions of the President. Where there is doubt as to the validity of executive action already completed Congress may, unless there is some constitutional obstacle to retroactive legislation, lend the necessary legislative authority to such action by ratification. An illustration is afforded by the act of August 6, 1861, in which Congress provided

¹ *Congressional Record*, vol. 111, Pt. 7, 89th Congress, 1st Sess. (May 4, 1965), p. 9282.

² *Memorandum, in Vietnam and International Law* by the Consultative Council of the Lawyers Committee on American Policy toward Vietnam (Flanders, N. J.: O'Hare Books, 1967), p. 127.

That all the acts, proclamations and orders of the President of the United States after the fourth of March, eighteen hundred and sixty-one, respecting the army and navy of the United States, and calling out or relating to the militia or volunteers from the States, are hereby approved and in all respects legalized and made valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States.³

William Howard Taft considered Wilson's occupation of Vera Cruz an act of war, and illegitimate in that it occurred before Congress had given the necessary authority, but said that the resolution which passed on the following day was "full and immediate ratification."⁴

It is possible to ratify executive actions of dubious validity by means of an appropriation act, but the standards of ratifications are rather exacting.

The most generous decision is that in *Brooks v. Dewar*⁵ in 1941. Instead of issuing term permits for the use of public grazing lands at reasonable fees based on the individual values of the permits, as the law required, the Secretary of the Interior had made a practice of issuing temporary licenses at a uniform fee. Congress, with full knowledge of this practice, had acted on the disposal of the revenue from the licenses. The Court held that this was ratification.

In *Isbrandtsen-Moller Co. v. United States*,⁶ in 1937, the Court held that an executive order by which the President abolished the Shipping Board and transferred its functions to the Department of Commerce had been ratified by three successive appropriations acts "all of which make appropriations to the Department of Commerce for salaries and expenses to carry out the provisions of the shipping act as amended and refer to the executive order."

In *Fleming v. Mohawk Co.*,⁷ in 1947, the Court held that when the President had consolidated agencies and Congress had appropriated funds for the use of the consolidated agencies this was "confirmation and ratification of the action of the Chief Executive."

In *Ex parte Endo*,⁸ in 1944, Justice Douglas, writing the opinion of the Court, denied that an appropriation act ratified all the activities it supported. Without statutory authority, the Relocation Authority had adopted the policy of detaining citizens of Japanese origin whose loyalty had been satisfactorily established in relocation centers if they would not agree to go to an approved place of residence upon release. In a habeas corpus action the Authority contended that Congress had ratified this policy by appropriating funds for the continued operation of the relocation centers. Justice Douglas said:

It is argued . . . that there has been Congressional ratification of the detention of loyal evacuees . . . through the appropriation of sums for the expenses of the Authority. . . . It is pointed out that the regulations and procedures of the Authority were disclosed in reports to the Congress and in Congressional hearings. . . . Congress may of course do by ratification what it might have authorized. . . . And ratification may be effected through appropriation acts. . . . But the appropriation must plainly show a purpose to bestow the precise

³ 12 Stat. 326.

⁴ *Our Chief Magistrate and His Powers* (New York: Columbia University Press, 1925), p. 96.

⁵ 313 U.S. 354, 361.

⁶ 300 U.S. 139, 147.

⁷ 331 U.S. 111, 116.

⁸ 323 U.S. 283.

authority which is claimed. We can hardly deduce such a purpose here where a lump sum appropriation was made for the overall program of the Authority and no sums were earmarked for the single phase of the total program which is here involved. Congress may support the effort to take care of these evacuees without ratifying every phase of the program.⁹

Justice Roberts concurred in the result, but he asserted that Congress had actually ratified the practice of detaining loyal citizens. He complained of the test applied by Douglas:

The decision now adds an element never before thought essential to congressional ratification, namely, that if Congress is to ratify by appropriation any part of the programme of an executive agency the bill must include a specific item referring to that portion of the programme.¹⁰

Quite possibly Justice Roberts was indignant that the Court relied on a proposition about ratification because he wished to press on to what he considered the central issue, the detention of citizens in violation of the due process clause. In any case, Douglas seems to have the better of it. There can be no ratification without an identification of what is being ratified. In the *Isbrandtsen-Moller* case, the executive order that was being ratified was identified in the act. In the *Fleming* case, Congress identified the consolidated agencies by name. It is true that in *Brooks v. Dewar* Congress made no explicit reference to the administrative practice that was being ratified. But in disposing of the revenue from that practice it did single out the practice and authorize its continuance.

In his message of May 4, 1965 asking for a supplementary appropriation, President Johnson described several things he had done in recent months. He had increased the armed forces in South Vietnam to 35,000; he had sent marines and airborne troops to two important areas; he had enormously increased the helicopter activity in South Vietnam; he had increased the number of sorties against North Vietnam from 160 in February to more than 1,500 in April; he had begun strike sorties in South Vietnam, and in March and April there were more than 3,200 of these. And, no doubt as a balancing measure to the strike sorties, he had sent the Deputy Surgeon General of the Army to assist in formulating "an expanded program of medical assistance for the people of South Vietnam."

But he did not ask for ratification of these concrete actions:

I do not ask complete approval for every phase and action of your Government. I do ask for prompt support of our basic course: resistance to aggression, moderation in the use of power, and a constant search for peace. Nothing will do more to strengthen your country in the world than the proof of national unity which an overwhelming vote for this appropriation will clearly show. To deny and delay this means to deny and delay the fullest support of the American people and the American Congress to those brave men who are risking their lives for freedom in Vietnam.¹¹

In short, he asked for two things. The first was \$700,000,000:

The additional funds I am requesting are needed to continue to provide our forces with the best and most modern supplies and equipment. They are needed to keep an abundant inventory of ammunition and

⁹ Id. at 303n.

¹⁰ Id. at 309.

¹¹ *Congressional Record*, p. 9284.

other expendables. They are needed to build facilities to house and protect our men and supplies.¹² The second request was for a vote of confidence.

On May 7, President Johnson signed into law a joint resolution of less than a hundred words which authorized the Secretary of Defense, "upon determination by the President that such action is necessary in connection with military activities in southeast Asia," to transfer \$700,000,000 from unappropriated funds to any existing military account.¹³

It was said in *Ex parte Endo* that to constitute a ratification "the appropriation must plainly show a purpose to bestow the precise authority which is claimed." The joint resolution of May 7 contained no other language than that authorizing the transfer of funds. It did not purport to alter the legal status of any past event. In view of this fact, and of President Johnson's denial that he asked "complete approval for every phase and action of your Government," it is hard to see how the appropriation can be read as a ratification of any particular action. The joint resolution had legal effect as an appropriation measure. It had no other legal effect.

Of course it had extralegal significance. President Johnson said that a vote for the appropriation was also a vote "to persist in our effort to halt Communist aggression in South Vietnam." This latter vote would not grant authority but would strike a posture. It would announce that "the Congress and the President stand united before the world"; it would be "proof of national unity." The striking of postures is not an exercise of the legislative power of Congress; it cannot take the place of the words "Be it enacted."

Suppose, however, that we supply the words "Be it enacted," and that we further interpret into the resolution the entire statement of purpose in the President's message. Suppose we assume that the resolution authorizes the President to accomplish these purposes: halting Communist aggression, preserving the independence of South Vietnam, "resistance to aggression, moderation in the use of power, and a constant search for peace." Do these words prescribe a definite course of action? Do they supply standards to guide the President? Do they specify the means which he is to employ? Clearly a resolution cast in these terms would be another attempt at the delegation of legislative power, which is forbidden by the Constitution.

When a supplementary defense appropriation bill came before the Senate in 1967, certain Senators attempted to forbid further escalation of the war by amendment to the bill. From a legal point of view, the administration was ill-advised to oppose the amendment, for by accepting limits to Presidential action it could easily have obtained a Congressional mandate for action within those limits. But the administration preferred to retain the whole war power in the President's hands. Accordingly, in the amendment which emerged from debate in the two houses and from conference committee and which passed both houses on March 8 Congress declared neither for war nor for peace. As before, it left the conduct of affairs entirely in the hands of the President, who might either abandon the war or further escalate it into a war with China without violating the amendment:

The Congress hereby declares:

¹² *Ibid.*, p. 9283.

¹³ 79 Stat. 109.

- (1) Its firm intentions to provide all necessary support for members of the armed forces of the United States fighting in Vietnam;
- (2) its support of efforts being made by the President of the United States and other men of good will throughout the world to prevent an expansion of the war in Vietnam and to bring that conflict to an end through a negotiated settlement which will preserve the honor of the United States, protect the vital interests of his country, and allow the people of South Vietnam to determine the affairs of that nation in their own way; and
- (3) is support for the convening of the nations that participated in the Geneva Conferences or any other meeting of nations similarly involved and interested as soon as possible for the purpose of pursuing the general principles of the Geneva accords of 1954 and 1962 and for formulating plans for bringing the conflict to an honorable conclusion.¹⁴

The first paragraph is not an exercise of the war power of Congress. It does not instruct the President to prosecute the war; it is merely a statement of the intention of Congress, which of course is not legally binding, to pass other appropriation act if he does. Nor does it appear that the second and third paragraphs have any legal effect. The most general principle of the Geneva accords of 1954 was the agreement upon the unification of the north and south zones of Vietnam by nationwide election.¹⁵ The announced purpose of the Johnson administration in waging war is the establishment of an independent South Vietnam. But even if the implied indorsement of unification in the third paragraph did not conflict with the second paragraph, it could not be argued that Congress by approving the Geneva accords—which, incidentally, forbade the introduction of foreign troops in Vietnam¹⁶—had forbidden the President to prosecute the war. The words are merely

¹⁴ *Congressional Quarterly Weekly Report*, Vol. 25, No. 10 (Mar. 10, 1967), p. 337.

¹⁵ "Agreement on the Cessation of Hostilities in Vietnam, July 20, 1954," Article 14 (a): "Pending the general elections which will bring about the unification of Vietnam, the conduct of civil administration in each regrouping zone shall be in the hands of the party whose forces are to be regrouped there [i.e., the Vietminh and the French] by virtue of the present Agreement." *Vietnam and International Law* by the Consultative Council of the Lawyers Committee on American Policy towards Vietnam (Flanders, N.J.: O Hare Books, 1967), p. 140.

"Final Declaration of the Geneva Conference, July 21, 1954," para. 5: "The Conference recognizes that the essential purpose of the agreement relating to Vietnam is to settle military questions with a view to ending hostilities and that the military demarcation line is provisional and should not in any way be interpreted as constituting a political or territorial boundary." Para. 6: "The Conference declares that, so far as Vietnam is concerned, the settlement of political problems, effected on the basis of respect for the principles of independence, unity and territorial integrity, shall permit Vietnamese people to enjoy the fundamental freedoms, guaranteed by democratic institutions established as a result of free general elections by secret ballot. In order to ensure that sufficient progress in the restoration of peace has been made, and that all the necessary conditions obtain for free expression of the national will, general elections shall be held in July, 1956, under the supervision of an international commission composed of representatives of the Member States of the International Supervisory Commission, referred to in the agreement on the cessation of hostilities." *Ibid.*, pp. 148, 149.

¹⁶ "Agreement on the Cessation of Hostilities in Vietnam, July 20, 1954," Article 16: "With effect from the date of entry into force of the present Agreement, the introduction into Vietnam of any troop reinforcements and additional military personnel is prohibited." Article 17(a): "With effect from the date of entry into force of the present Agreement, the introduction into Vietnam of any reinforcements in the form of all types of arms . . . is prohibited." Article 18: "With effect from the date of entry into force of the present Agreement, the establishment of new military bases is prohibited throughout Vietnam territory." Article 19: "With effect from the date of entry into force of the present Agreement, no military base under the control of a foreign State may be established in the regrouping zone of either party; the two parties shall ensure that the zones assigned to them do not adhere to any military alliance and are not used for the resumption of hostilities or to further an aggressive policy." *Ibid.*, pp. 141-3.

"Final Declaration of the Geneva Conference, July 21, 1954," para. 4: "The Conference takes note of the clauses in the agreement on the cessation of hostilities in Vietnam prohibiting the introduction into Vietnam of foreign troops and military personnel as well as all kinds of arms and munitions." Para. 5: "The Conference takes note of the clauses in the agreement on the cessation of hostilities in Vietnam to the effect that no military base under the control of a foreign power may be established in the regrouping zones of the two parties. . . ." *Ibid.*, p. 148.

precatory. In the amendment Congress resolutely maintained its position of interested bystander. It refused to discharge its constitutional duty of determining whether there should be war or peace. Representative Bates was quite right when he said of the amendment: "It is almost innocuous. It is barely a pious preachment."¹⁷

Clearly a majority of the Congressmen are happy to leave matters in this posture. They prefer that the President take the decisions; this spares them a responsibility to which they feel unequal. But in a republican form of government they must bear that responsibility. And there is every likelihood that the task will be better discharged by the collective judgment of the two houses after full debate than by the private resolution of a single man.

The President has no inherent constitutional power to engage in war. Whatever one thinks of the scope of his right to protect citizens or to practice reprisal for injuries to citizens, neither of these is involved in Vietnam. The Senate has no power to authorize war by treaty, nor does the SEATO treaty purport to do so. Congress cannot delegate the war power. The Tonkin Gulf Resolution is unconstitutional because it affronts the most fundamental principle of the division of powers in our constitutional system. Nor can this fundamental principle be avoided by passing appropriations.

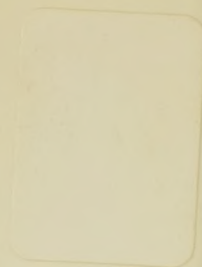
Although executive war-making is illegal, it is practiced; and ultimately practice makes the law. And the transfer of the war power to the executive will draw other powers with it. If we continue to follow the easy downward course of executive aggrandizement, our republican institutions will become as unsubstantial as those of imperial Rome. But perhaps this was our destiny. When the United States embarked upon a course of imperialism with the Spanish-American War, the distinguished political scientist John W. Burgess warned that this meant the end of constitutional government:

There is nothing now to prevent the Government of the United States from entering upon a course of conquest and empire. . . . We are by no means a peaceably included people. . . . In fact, besides being belligerent and boastful, we are restless, nervous, and at times hysterical. We have just the qualities to answer the call of a Napoleon in the Presidency.¹⁸

¹⁷ *Congressional Quarterly Weekly Report* (Mar. 10, 1967), p. 373.

¹⁸ *The Reconciliation of Government With Liberty* (New York: Scribner's, 1915), p. 373.





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